No. 84-468-CFX
Status: GRANTED

Title: City of Cleburne, Texas, et al., Petitioners
v.
Cleburne Living Center, et al.

Docketed:
September 22, 1984

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioners: Luna, Earl

Counsel for respondent: Hicks, Renea

Entry	Date	Note	Proceedings and Orders
1	Sep 22 1984	G	Petition for writ of certiorari filed.
2	Oct 23 1984		Brief of respondents Cleburne Living, et al. in opposition filed.
3	Oct 24 1984		DISTRIBUTED. November 9, 1984
4	Nov 5 1984	X	Reply brief of petitioners Cleburne, TX, et al. filed.
5	Nov 13 1984		Petition GRANTED.
			**********
6	Dec 24 1984		Brief of petitioners Cleburne, TX, et al. filed.
7	Dec 24 1984		Joint appendix filed.
8	Dec 31 1984		Brief amicus curiae of Federation of Greater Baton Rouge Civic Assns. filed.
9	Dec 31 1984	D	Motion of The Federation of Greater Baton Rouge Civil Associations Inc. for leave to participate in oral argument as amicus curiae, for divided argument and for additional time filed.
10	Jan 3 1985	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
11	Jan 2 1985		Brief amicus curiae of United States filed.
12	Jan 5 1985		Record filed.
13	Jan 5 1985		Record filed.
14	Jan 14 1985		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED. Justice Powell OUT.
15	Jan 14 1985		Motion of The Federation of Greater Baton Rouge Civil Associations Inc. for leave to participate in oral argument as amicus curiae, for divided argument and for additional time DENIED. Justice Powell OUT.
17	Jan 16 1985		Order extending time to file brief of respondent on the merits until February 2, 1985.
18	Jan 16 1985	D	Motion of Texas, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
19	Jan 26 1985	G	Motion of Disabled Peoples' International, et al. for leave to file a brief as amici curiae filed.
20	Jan 29 1985		Brief amicus curiae of Pennsylvania, et al. filed.
21	Feb 1 1985		Brief amicus curiae of Maryland filed.
22	Feb 1 1985	G	Motion of American Association on Mental Deficiency, et al. for leave to file a brief as amici curiae filed.
23	Feb 1 1985		Brief of respondents Cleburne Living, et al. filed.
24	Feb 1 1985		Brief amicus curiae of Connecticut, et al filed.

No. 84-468-CFX

Entry	Date	Note	Proceedings and Orders
25	Feb 1 1985	G	Motion of National Conference of Catholic Charities, et al. for leave to file a brief as amici curiae filed.
26	Feb 1 1985	G	Motion of Disability Rights Education and Defense Fund for leave to file a brief as amicus curiae filed.
27	Feb 1 1985	G	Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae filed.
28	Feb 1 1985		Brief amicus curiae of Texas, et al. filed.
29	Feb 2 1985	G	Motion of Association for Retarded Citizens of the United States, et al. for leave to file a brief as amici curiae filed.
30	Feb 1 1985	G	Motion of The National Association for Rights Protection and Advocacy, et al. for leave to file a brief as amici curiae filed.
31	Feb 5 1985		SET FOR ARGUMENT. Monday, March 18, 1985. (2nd case).
32	Feb 11 1985		CIRCULATED.
33	Feb 19 1985		Motion of Texas, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED. Justice Powell OUT.
34	Feb 19 1985		Motion of Disabled Peoples' International, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
35	Feb 19 1985		Motion of American Association on Mental Deficiency, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
36	Feb 19 1985		Motion of National Conference of Catholic Charities, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
37	Feb 19 1985		Motion of Disability Rights Education and Defense Fund for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
38	Feb 19 1985		Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
39	Feb 25 1985		Motion of Association for Retarded Citizens of the United States, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
40	Feb 25 1985		Motion of The National Association for Rights Protection and Advocacy, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.
41	Mar 7 1985	X	Reply brief of petitioners Cleburne, TX, et al. filed.
42	Mar 18 1985		ARGUED.

84-468

Office - Supreme Court, U.S.
FILED
SEP 22 1984
ALEXANDER L. STEVAS,
CLERK

No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,

Petitioners,

v.

CLEBURNE LIVING CENTER, et al.,

Respondents.

PETITION FOR A WRIT OF CETIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF EARL LUNA, P.C.

EARL LUNA
ROBERT T. MILLER, JR.
MARY MILFORD
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

ATTORNEYS FOR PETITIONERS

89 PP

QUESTIONS PRESENTED

1. Whether mentally retarded persons are a "quasi-suspect" class for purposes of Equal Protection analysis.
2. Whether for Equal Protection analysis, all legislation affecting mentally retarded persons must be tested by an "intermediate" or "heightened" level of scrutiny.

LISTING OF PARTIES

PETITIONERS:

City of Cleburne, Texas
George W. Marti, Mayor of the City of Cleburne
J. T. Bass, Member of the Cleburne City Council
Arval Martin, Jr., Member of the Cleburne City Council
Lonnie Watson, Former Member of the Cleburne City Council, who resigned August 30, 1984
(Replaced Alfred Johns, deceased)
Susan McMillion, Cleburne City Attorney
(Replaced Robert T. Miller, Jr.)

ATTORNEYS FOR PETITIONERS:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert T. Miller, Jr.
Mary Milford

RESPONDENTS:

Cleburne Living Center, Inc.
(Now known as Community Living Concepts, Inc.)
Johnson County Association for Retarded Citizens
Jan Hannah
Advocacy, Inc.

ATTORNEYS FOR RESPONDENTS:

Advocacy, Inc.
Renea Hicks
Diane Shisk

TABLE OF CONTENTS

	Page
Questions Presented	i
Listing of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	2
Grounds for Jurisdiction	2
Constitutional Provision Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
There is a Conflict Among the Circuits	6
The Question is Substantial	9
The Court of Appeals Decision is Incorrect	15
Conclusion	21
Proof of Service	22

Appendix

Unpublished Memorandum Opinion-Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Texas. *Cleburne Living Center, Inc., et al. v. City of Cleburne, Texas, et al.*, No. CA3-80-1576-F (N.D. Tex. October 4, 1982) A-1

Judgment of the United States District Court for the Northern District of Texas. *Cleburne Living Center, Inc., et al. v. City of Cleburne, Texas, et al.*, No. CA3-80-1576-F (N.D. Tex. October 4, 1982) B-1

TABLE OF CONTENTS — (Continued)

Appendix — (Continued)

Page

Opinion of the United States Court of Appeals for the Fifth Circuit in *Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas, et al.*, 726 F.2d 191 (5th Cir. 1984) C-1

Opinion of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing and Suggestion for Rehearing En Banc in *Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas, et al.*, 735 F.2d 832 (5th Cir. 1984) D-1

Mandate of the United States Court of Appeals and the Fifth Circuit in *Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas, et al.*, issued on July 16, 1984 ..... E-1

Order of the United States Court of Appeals for the Fifth Circuit dated August 27, 1984, granting Appellees' Motion to Recall and Stay the Mandate until September 27, 1984 ..... F-1

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981) ... 5, 8

Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473 (D.N.D. 1982), aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983) ... 8, 9

Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966, 102 S.Ct. 3469 (1982) ... 4, 14, 15

Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) ... 5, 6, 8, 20, 21

California Association of the Physically Handicapped, Inc. v. Federal Communications Commission, 721 F.2d 667 (9th Cir. 1983) ... 5, 6, 7, 20, 21

Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas et al., No. CA3-80-1576-F (N.D. Tex. October 4, 1982) ... 2, 4

Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas et al., 726 F.2d 191 (5th Cir. 1984) ... passim

Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas et al., 735 F.2d 832 (5th Cir. 1984) ... passim

Developmental Disabilities Advocacy Center, Inc. v. Melton, 521 F. Supp. 365 (D.N.H.) 1981) ... 5, 8

Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) ... 19

Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973) ... 5, 8, 19, 21

Halderman v. Pennhurst State School & Hospital, 446 F. Supp. 1295 (E.D. Pa. 1978) ... 7

TABLE OF AUTHORITIES — (Continued)

	Page
Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671 (1980)	11
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562 (1976)	19, 20
McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101 (1961)	20
New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973)	5, 8
Parham v. Hughes, 441 U.S. 347, 99 S.Ct. 1742 (1979)	18
San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973)	16, 17
United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778 (1938)	16
Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975)	15
STATUTES	
20 U.S.C. § 1401, *et seq.*	9, 11
28 U.S.C. § 1254(1).	2
29 U.S.C. § 706	7
29 U.S.C. § 794	6, 7, 11
42 U.S.C. § 6000, *et seq.*	11
Texas Vernon's Ann. Civ. St. art. 5547-300	12
CONSTITUTION	
U.S. Constitution, Amendment XIV, Sec. 1	passim

TABLE OF AUTHORITIES — (Continued)

Page

OTHER AUTHORITIES

Department of Transportation and Related Agencies Appropriation Acts, 1975-1984 11

Johnson, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?*, 7 Ohio No. L. Rev. 64 (1980) 10

Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. Rev. L. & Soc. Change 137 (1975) 10

Reiner, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W.Va. L. Rev. 669 (1980). 10

Roberto, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 Wayne L. Rev. 1349 (1982) 10, 12

No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,

Petitioners,

v.

CLEBURNE LIVING CENTER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 5, 1984, rehearing en banc and panel rehearing denied July 6, 1984.

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, filed its unpublished Memorandum Opinion — Findings of Fact and Conclusions of Law on October 4, 1982, which is reprinted in Appendix A. The Judgment, also filed on October 4, 1982, is reprinted in Appendix B.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed March 5, 1984, reported in 726 F.2d 191, is reprinted in Appendix C.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed July 6, 1984, denying Petition for Rehearing and Suggestion for Rehearing En Banc, reported at 735 F.2d 832, is reprinted in Appendix D. The mandate was issued on July 16, 1984, reprinted in Appendix E, and on August 27, 1984, the Court entered its Order granting a recall and stay of the mandate until September 27, 1984, which Order is reprinted in Appendix F.

GROUNDS FOR JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 5, 1984, and is reported at 726 F.2d 191. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on July 6, 1984, and this Petition for a Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment XIV, Sec. 1

[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents brought suit to have the City of Cleburne's zoning ordinance declared unconstitutional which, although it allows placement of a business providing residential care for mentally retarded persons anywhere in the City, requires a special use permit for the establishment of such a business. The pertinent portions of the ordinance are reprinted in the opinion below, Appendix C-6; 726 F.2d at 193. After consideration of several factors, the City found the location applied for was inappropriate to the proposed use and denied the special use permit. See opinion below, Appendix C-23; 726 F.2d at 194.

The District Court applied the "rational basis" test to the ordinance, as written and as applied, and found it to be rationally related to legitimate purposes and interests of the City of Cleburne. Furthermore, it was not arbitrary, capricious nor irrational.

The panel established that mentally retarded persons were a "quasi-suspect" class for Equal Protection analysis and applied an intermediate level of scrutiny, requiring that the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives, to the review of the ordinance. While the panel found that the interest asserted by the City was substantial in nature, it found that there was not the required *substantial* nexus between the asserted interests and the ordinance and therefore, held that the

ordinance violated the Equal Protection clause of the Fourteenth Amendment, both as written and as applied. Key to the panel's decision in finding the lack of necessary relevance of the ordinance to the City's goals was the panel's *assumption* that because the property in question was located in an apartment house district, "the same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." See opinion below, Appendix C-20; 726 F.2d at 200. This is simply not so. The structure in question was a 2500 square foot frame house with four bedrooms and two baths in which Petitioners planned to house fifteen unrelated adult men and women along with support staff. The ordinance does not confer on this structure the characteristics of a boarding house for fifteen people or of a hospital, which is also a permitted use. One of the prime reasons for the denial of the special use permit was that the structure was not appropriate for its intended use of housing fifteen people — nor would it be appropriate as a boarding house for that many people.[1] The evidence shows that the state has now reduced the number of people to six in such a facility verifying the reasonableness of the City Council decision. See District Court opinion Finding of Fact 38 at p 11. Appendix A-9, 10.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to resolve the Questions Presented which concern whether mentally retarded persons are a "quasi-suspect" class for purposes

---

[1]This Court has held in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 102 S.Ct. 3469 (1982), that a governmental entity has the authority, rather than a federal court, to interpret its own legislation.

of Equal Protection analysis, and the appropriate level of scrutiny to be applied to the challenged zoning ordinance of the City of Cleburne.

The decision below is in direct conflict with the decision of the Ninth Circuit Court of Appeals in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983), the decision of another Fifth Circuit panel in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), as well as the district court opinions in *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981), *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 521 F. Supp. 365 (D.N.H. 1981), and *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), as to the status of mentally retarded and other handicapped persons for Equal Protection analysis and as to the level of scrutiny to be applied in reviewing legislation[2] which affects those persons. The establishment of the appropriate classification and level of scrutiny for Equal Protection review of legislation affecting mentally retarded persons are substantial and important federal questions which have not been, but which should be, settled by this Court.

Finally, the decision below is contrary to the principle established by the Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973) that intelligence and physical disability are non-suspect statuses.

---

[2]The term "legislation" is used in this Petition as being inclusive of agency regulatory action or other governmental promulgations as well as legislation.

THERE IS A CONFLICT AMONG THE CIRCUITS

It is clear that the conflict between the United States Court of Appeals for the Fifth Circuit and Ninth Circuit is one that can be effectively resolved only by the prompt action of the Supreme Court alone. In determining whether mentally retarded persons constitute a "quasi-suspect" class, the Fifth Circuit incorrectly characterized the question "as one of first impression" among appellate courts. See opinion below, Appendix C-12; 726 F.2d at 196. The Fifth Circuit's treatment of what it determined to be a novel issue is, however, contrary to the decision of the Ninth Circuit in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983) and a decision of its own panel in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), both of which held that the handicapped, which includes mentally retarded, were a non-suspect class for which rational basis level review is appropriate.

In *California Association of the Physically Handicapped*, the plaintiff brought suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Fourteenth Amendment for the FCC's refusal to include the handicapped in its EEO program, arguing that the handicapped should be considered a suspect class and that under the strict scrutiny standard applicable to a suspect class, the FCC's actions should be held unconstitutional. In applying the "rational basis" test to distinctions involving non-suspect classifications, the Ninth Circuit unequivocally stated the following:

> No appellate court, however, has held that the handicapped are a suspect class. *Brown v. Sibley*, 650 F.2d 760, 766 (5th Cir. 1981). We decline to be the first.

In *Brown*, which the Ninth Circuit relied on in *California Association of Physically Handicapped*, the Fifth Circuit panel was likewise presented with a handicapped plaintiff's request for strict judicial scrutiny under the Fourteenth Amendment and for review under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, of a state agency's policy against the visually impaired working in supervisory positions. The Fifth Circuit held that "the only inquiry is whether [the defendant state agency's] alleged classification scheme is 'rationally related to the [state agency's] objective' " and stated that:

> No Court has ever declared that handicapped persons constitute a suspect class for purposes of equal protection analysis, and we decline to do so today.

Brown, supra at 766.

Both the *Brown* and *California Association of Physically Handicapped* cases were brought within the context of Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and ruled on the Equal Protection status of handicapped persons as defined by the Rehabilitation Act, which specifically includes mentally retarded persons.[3] *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1978).

Therefore, the decision of the Fifth Circuit panel in the case below is novel, not because it is a case of "first impres-

---

[3]The Rehabilitation Act, 29 U.S.C. § 706, defines a handicapped individual as:

> . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

sion" but rather because it is at odds not only with the Ninth Circuit and the Fifth Circuit panel in *Brown*, but also because it is contrary to the principles established in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973). This Court in *Frontiero*, stated that sex is an immutable characteristic and held that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny but carefully distinguished "... sex from such *nonsuspect statuses as intelligence or physical disability*" for the reason "that the sex characteristic frequently bears no relation to ability to perform or contribute to society." (emphasis supplied). *Id.* at 686.

Furthermore, at the district court level, *Anderson v. Banks*, 520 F. Supp. 472, 512 (S.D. Ga. 1981) held that mentally retarded persons were not a suspect or "quasi-suspect" class. Two other district courts have also failed to confer "quasi-suspect" status on mentally retarded persons, even when they are institutionalized, *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 521 F. Supp. 365, 371 (D.N.H. 1981); *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973).

The only district court decision to apply a heightened level of scrutiny dealing with mentally retarded persons is *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983), which involved the deplorable conditions at the state school for the mentally retarded. The *Olson* court found that mentally retarded persons failed to satisfy the criteria for suspect status; however, the court required the state "to show that the disparities in educational opportunity which exist between the mentally

retarded and other citizens substantially furthers important state interests". *Id.* at 490.

The Eighth Circuit resolved the issues presented in *Olson* under North Dakota law and the Education for All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, without having to reach any Equal Protection issues regarding the mentally retarded.

It is also important to consider that seven out of the fifteen judges who comprise the Fifth Circuit Court of Appeals dissented from the denial of a rehearing en banc by the other eight members of the Court in the decision below. Six out of the seven dissenters stated that "[t]he panel has made a holding no other federal appellate court has" and found the holding "not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration." See dissent to denial of rehearing, Appendix D-2; 735 F.2d at 832.

In holding that the mentally retarded constitute a "quasi-suspect" class for Equal Protection purposes and that legislation regarding the mentally retarded should be given intermediate scrutiny, the panel rejected the position that has either been adopted or supported by the Courts of Appeal which have already considered these matters and a clear majority of the federal district courts which have ruled on the question to date as well as this Court's holding in *Frontiero*. The conflict is explicit and direct. The Court should grant a writ of certiorari to resolve this conflict.

THE QUESTION IS SUBSTANTIAL

This Court has not had an opportunity to review whether mentally retarded persons constitute a new "quasi-suspect"

class for Equal Protection analysis or whether legislation which affects the mentally retarded should be given intermediate scrutiny. These questions are important ones on which this Court should rule.

The panel's resolution of these sensitive constitutional issues obviously invites new plaintiffs to litigate a potentially vast spectrum of issues in the federal courts on the strength of the panel's holding. Municipalities, states, state agencies, and school districts across the nation can expect to face a plethora of federal challenges to their ordinances, statutes, regulations and policies affecting the mentally retarded if the panel decision stands. The vast amounts of public resources which undoubtedly will be consumed in this forthcoming litigation are resources that could otherwise be used to help the mentally retarded. The specter of these oncoming legal battles, with their attendant expense and consumption of judicial resources, genuinely merits the attention of this Court before the floodgates are opened in this highly sensitive and emotional area.

Needs of the mentally retarded have been and should be addressed legislatively rather than by the judiciary. The commentators are legion in their espousal of the legislative approach over the clearly less preferred litigious constitutional approach in promoting and protecting the rights of the handicapped, including the mentally retarded.[4] Indeed,

---

[4]Johnson, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?* 7 Ohio No. L. Rev. 64 (1980); Roberto, *Can the Mentally Retarded Enjoy "Yards that are Wide?"*, 28 Wayne L. Rev. 1349 (1982); Reiner, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning;* 82 W.Va. L. Rev. 669 (1980); Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives,* 5 N.Y.U. Rev. L. & Soc. Change 137 (1975).

this Court has held that courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Harris v. McRae*, 448 U.S. 297, 307, 100 S.Ct. 2671, 2683 (1980).

The rights of the handicapped, including the mentally retarded, are already protected by Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) which provides that

> no otherwise qualified handicapped individual . . . shall solely by reason of his handicap, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal assistance.

The Developmental Disabilities Services and Bill of Rights Act, 42 U.S.C. § 6000, *et seq.*, established another federal-state grant program and declared that persons with developmental disabilities have "a right to appropriate treatment, services, and habilitation" which "should be provided in the setting that is least restrictive of that person's personal liberty." The Education for All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, provides that the federal government would assist the states in giving all handicapped children a free appropriate public education, and requires "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped," thus requiring what is known as "mainstreaming." Likewise, Department of Transportation and Related Agencies Appropriation Acts, 1975-1984, require that an applicant for federal financial assistance provide certain facilities and services to the elderly and disabled.

The legislature of the State of Texas has provided for the protection of the rights of the mentally retarded in the

Mentally Retarded Persons Act of 1977 (Vernon's Ann. Civ. St. art 5547-300) including the "right to live in the least restrictive habilitation setting appropriate to the individual's needs and be treated and served in the least intrusive manner appropriate for the individual's needs." Section 15. The Respondents, in fact, alleged violations of this Act in their Original Complaint; however, they opted to no longer pursue these pendent state claims and voluntarily dismissed them. R. Vol. I, p. 238. Additionally, 22 states have enacted statutes mandating in various ways and degrees the location of community homes in residential areas.[5]

The Fifth Circuit's establishment of the mentally retarded as a new cognizable "quasi-suspect" class may place in jeopardy the application of these laws protecting the handicapped, including the mentally retarded. By entitling the mentally retarded to a heightened level of judicial scrutiny and "quasi-suspectness," the Fifth Circuit's opinion could emasculate the heretofore mentioned laws which protect the handicapped, including the mentally retarded, because it would be a violation of the mental retardate's constitutionally afforded rights to treat him or her in a different manner than a person of greater intelligence, ability, social adaptability, and economic productivity.

Rather than institute a sweeping change throughout the nation which will affect each mentally retarded person indiscriminately without regard to his or her particular developmental level and disability, the Petitioners urge this Court to consider that the condition of each mentally retarded person is unique in that he or she may be classified anywhere at a level ranging from a moderate or mild re-

---

[5]Roberto, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 Wayne L. Rev. 1349, 1378 (1982)

tardate to an individual possessing severely and profoundly retarded characteristics, with each mental retardate requiring a different level and degree of treatment. See dissent to denial of rehearing, Appendix D-5, 6; 735 F.2d at 834.

The Respondents' expert, Dr. Roos, testified at trial that mental illness and mental retardation require "entirely different approaches." See opinion below, Appendix C-4; 726 F.2d at 197, n.2. Judge Garwood and the other dissenters who joined with him found this testimony to be significant in raising the issue in their minds as to whether "the presence of difference in approach" is to be treated as "quasi-suspect". See dissent to denial of rehearing. Appendix D-4; 735 F.2d at 833. Judge Garwood went on to state

> It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"? Are we to review as "quasi-suspect" the failure of governmental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared? Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the non-retarded, but where

> judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded. (emphasis in the original).

Appendix D-4, 5; *Id.* at 833-834.

As Judge Garwood has suggested, the Fifth Circuit panel's decision to classify all the mentally retarded as a "quasi-suspect" class with attendant heightened scrutiny will obviously involve the courts in the issue which will inevitably be raised regarding the adequacy of medical treatment for the mentally retarded. It is important to consider the corollary of these consequences — the federal judiciary's intrusion into the state's regulations regarding the mentally retarded. Judge Garwood determined:

> State regulations will inevitably distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view a *major and unwarranted extension of federal judicial powers*, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. (emphasis supplied).

Appendix D-6; *Id.* at 834.

Furthermore, the Fifth Circuit's decision in the case below will greatly impact the autonomy of state, local and school authorities to interpret their own legislation. This Court has held in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 102 S.Ct. 3469, 3471, 3472 (1982) that a school "[b]oard's interpretation of its own regulations

controls" over a judicial interpretation of the regulations because "federal courts were not authorized to construe school regulations." In holding that the Court of Appeals erred in substituting its own notions for the school board's definition of its rules, this Court in *McCluskey* relied upon its prior holding in *Wood v. Strickland*, 420 U.S. 308, 325, 95 S.Ct. 992, 1002 (1975):

> "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement."

Supra, at 3471. Unless writ of certiorari is granted, the Fifth Circuit's decision in the case below will stand as a harbinger of unnecessary and unwarranted judicial interference in state, local and school legislation and the ability of those entities to interpret their own legislation.

The timely resolution of this issue is a vital one to all the municipalities, states, state agencies and school districts across the nation as well as the United States government in the implementation of the laws regarding the handicapped, including the mentally retarded, as it is to the City of Cleburne and Community Living Concepts, Inc.

THE COURT OF APPEALS DECISION IS INCORRECT

Petitioners contend that the mentally retarded do not constitute a "quasi-suspect" class for purposes of Equal Protection analysis, and that the challenged zoning ordinance of the City of Cleburne should be analyzed at the rational review level.

Mental retardation is essentially a problem of learning manifested in difficulty with abstract thinking, judgment, problem solving and retention, and includes problems of

social adjustment and economic productivity. (R. Vol. 1, pp. 137-138). It is a varied condition ranging from mildly and moderately retarded to severely and profoundly retarded with IQ as the basic measurement device as well as adaptive behavior and medical classification, according to Dr. Roos. (R. Vol. 1, p. 138). Mild retardation is hardly discernible on casual contact; the mentally retarded can become self-sufficient, economically productive members of society, in fact, most become "invisible" after they leave school, whereas, at the other end of the spectrum, many of the profoundly retarded are devoid of any degree of self-sufficiency and require institutionalization. (R. Vol. 1, p. 140). This description given by Dr. Roos is a far cry from the "discrete, insular minority" referred to in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, 58 S.Ct. 778, 783-784, n.4 (1938).

In many instances it would be necessary to subject these persons to an IQ test to determine if they are in the protected class, with those having an IQ of 70 or under being a "quasi-suspect" specially protected class and those having an IQ over 70 not qualifying for this special solicitude from the courts. (R. Vol. 1, p. 140). Mentally retarded persons are in reality a "large, diverse and amorphous class" and as such they do not qualify for "quasi-suspect" status. See *San Antonio Independent School District v. Rodriguez*, 411 U.S.1, 28, 93 S.Ct. 1278, 1294 (1973).

While courts have recognized and defined criteria for a suspect classification, the "quasi-suspect" classification is still in an emerging state of definition without specified parameters. The establishment of a "quasi-suspect" class appears to turn on whether the classes share some of the criteria of suspectness. However, the courts have left

unanswered which of these criteria are most relevant and how much weight they should be given.

At the outset, the panel recognized that the mentally retarded did not satisfy all of the criteria for a suspect class. The panel did not establish a clear-cut rule for a determination of "quasi-suspect" status, but arrived at a factual determination that mentally retarded persons shared three of the criteria for suspectness — historical prejudice, political powerlessness and immutability — which were set out in *San Antonio Independent School District vs. Rodriguez, Id.*

The panel based its finding of historical prejudice and political powerlessness on conditions that existed in the first half of the century but that have since ceased to exist or changed dramatically since 1950. Dr. Phil Roos testified that while mentally retarded persons may not have been well treated in the past, this is no longer the situation:

Q. What happened in 1950?

A. A number of things — a presidential panel on mental retardation was established, which later became the President's Committee on Retardation, which became a strong and viable advocate for retarded persons at the national level. Our own association, the Association for Retarded Citizens, was founded in 1950, and became a very strong consumer advocate voice in the nation. A new philosophy began to permeate the field of mental retardation and other disabilities; consumerism became an important force. (R. Vol. 1, p. 142).

Q. Well, has the public a good understanding of mental retardation today?

A. It has improved in the last few years. This has been due in part to media coverage, and to the picturing of mentally retarded people through the media as real, genuine human beings. (R. Vol. 1, p. 144).

Likewise, the mentally retarded are not a politically powerless group. This fact is evidenced by the various legal reforms concerning the rights of the mentally retarded that have occurred in many states as well as by the enactment of federal legislation aimed at continually improving the conditions of the handicapped, including the mentally retarded, as were enumerated in the prior section. The proliferation of advocacy and representative groups for the handicapped bears witness to their growing political power. In the case at bar, two such groups are interested — Advocacy, Inc., a federally funded legal advocacy group, and the Johnson County Association for Retarded Citizens.

Finally, the panel declared that the mentally retarded deserved special consideration because their condition is immutable. See *Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745 (1979). However in doing so, the panel totally ignored the relationship of the disability to the stereotypical thinking associated with mentally retarded persons, which Judge Garwood termed the "threshold requirement for scrutiny beyond the rational basis level". See dissent to denial of rehearing, Appendix D — ; 735 F.2d at 832. In other words, to establish this threshold requirement, the panel should have determined whether the class of the mentally retarded lacks a

> significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either generally or in respect to the regulatory area under consideration.

Appendix D-5; 735 F.2d at 834. Distinctions based on sex, legitimacy, or illegal alienage come within the ambit of "quasi-suspectness" for Equal Protection analysis, and are

"generically different" from a classification based on mental retardation. See dissent to denial of rehearing, Appendix D-2; 735 F.2d. at 832-833. Judge Garwood is entirely accurate in his statement that the mentally retarded "*are* materially different from the rest of society, and are so as a result of their class-defining characteristics." (emphasis in the original). See dissent to denial of rehearing, Appendix D-3; 735 F.2d at 833.

As this Court observed in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973):

> ...what differentiates sex from such *non-suspect statuses as intelligence or physical disability*, and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.* (emphasis supplied).

Subsequently, in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567 (1976), this Court again made reference to the relationship of the stereotyped characteristic to the actual ability. The Third Circuit heeded the *Frontiero* and *Murgia* decisions in deciding that mentally ill persons were not a suspect class in *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979). Although mental retardation is a totally different disability than mental illness, the rationale of the relationship between the actual disability and the stereotype characterization is applicable to some of the mentally retarded.

The Fifth Circuit dissent to the denial of the rehearing, Appendix D-3, 4; 735 F.2d at 833, distinguished the unique differences inherent in the mentally retarded:

> The characteristics which define the retarded as a class — the presence from birth or early childhood of

> an incurable, though ameliorable, significant deficit in intellectual development and social adaptation — bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions, and are highly relevant to proper legislative goals in most respects.
>
> And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill ... In short, the retarded present a *special* set of needs, requirements, and problems unique to their condition. (emphasis in the original).

This Court should not acquiesce to the establishment of yet another new "quasi-suspect" class, comprised of the mentally retarded and the challenged zoning ordinance should be scrutinized at the rational basis level. In both *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981) and its progeny, *California Association of the Physically Handicapped, Inc.*, 721 F.2d 667 (9th Cir. 1983), the Courts of Appeal applied the "rational basis" test to legislation affecting the mentally retarded after holding that handicapped persons did not constitute a "suspect class." The second prong of this analytical process only inquires as to whether the challenged zoning ordinance is "rationally related to the [City's] objective." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 315, 96 S.Ct. 2562, 2568 (1976). "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [City's] objective." *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1105 (1961).

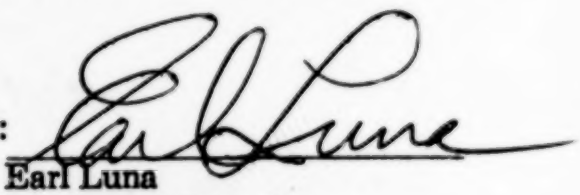
The decision below refuses to recognize the decisions in *Brown v. Sibley, supra,* and *California Association of the Physically Handicapped, Inc., supra,* as well as the principles established by this Court in *Frontiero, supra,* which cases declined to apply suspectness to the handicapped, which includes the mentally retarded, but did apply the rational basis level of review to those who are classified according to intelligence and physical disability, which includes the mentally retarded. The lower court's refusal to apply these prevailing precedents as well as the potential impact on state, local and federal legislation is so erroneous as to call for correction by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted

LAW OFFICES OF EARL LUNA, P.C.

By: 

Earl Luna
Robert T. Miller, Jr.
Mary Milford
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Attorneys for Petitioners

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners herein in all proceedings in which they have been involved in the Courts below.

I further state upon oath that on the 21st day of September, 1984, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States mail, with first-class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Renea Hicks and Ms. Diane Shisk, Advocacy, Inc., 1006 East 50th Street, Austin, Texas 78751.

Earl Luna
Earl Luna

SUBSCRIBED AND SWORN To before me by the said Earl Luna, on this the 21st day of September, 1984.

Betty Jarratt
Notary Public, State of Texas
My commission expires 11/30/84

APPENDIX

U.S. District Court
Northern District of Texas
F I L E D
Oct. 4, 1982
Joseph McElroy, Jr., Clerk
By Pam Hill
Deputy

In The

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

NO. CA-80-1576-F

CLEBURNE LIVING CENTER, et al.,

v.

CITY OF CLEBURNE, TEXAS, et al.

MEMORANDUM OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Plaintiff Cleburne Living Center, Inc. (hereinafter referred to as "CLC") is a three shareholder Texas corporation organized for the purpose of establishing and operating supervised group homes for persons who are mentally retarded. The corporation is not a non-profit organization. It has leased a house at 201 Featherston Street in the City of Cleburne, Texas from Jan Hannah for the purpose of establishing a group home for thirteen mentally retarded adults at that address. On or about February 4, 1982, CLC changed its corporate name to Community Living Concepts, Inc., but the name change left unaffected all other aspects of CLC.

2. Plaintiff Jan Hannah is CLC's Vice President and holds one third of the corporation's outstanding stock. She is the owner of the house at 201 Featherston Street in the City of Cleburne, having purchased it in July, 1980, for the purpose of leasing it to CLC for the operation of a group home for persons who are mentally retarded.

3. Plaintiff Johnson County Association for Retarded Citizens (hereinafter Johnson County ARC) is a non-profit Texas corporation established for the purpose of advocating and representing the interests of the mentally retarded residents of Johnson County. It has approximately two hundred (200) members, among whom are parents of mentally retarded children and adults, mentally retarded persons (at least one of whom, Sylvia Sims, is a potential resident of the home), special education teachers and educational diagnosticians employed by the Cleburne Independent School District, and other concerned Johnson County residents. As an organization, it supports the establishment of group homes, including the Featherston Street one, for persons who are mentally retarded.

4. Plaintiff Advocacy, Inc., is a non-profit Texas corporation formed to insure and protect the legal rights of persons who are developmentally disabled, including those who are mentally retarded persons. It is a statewide legal advocacy system affiliated with the State Bar of Texas and established pursuant to 42 U.S.C. § 6012. Among the rights for which Advocacy, Inc. advocates is the right of mentally retarded persons to live in group homes in community settings.

5. Defendant City of Cleburne is a municipal corporation established pursuant to the laws of the State of Texas. As a Texas municipal corporation, the city has certain powers and duties, among which are certain zoning powers.

6. Defendant George W. Marti is the Mayor of the City of Cleburne. In conjunction with his duties as mayor, he is the chairman of the City of Cleburne City Council and a voting member of that council in case of ties.

7. Defendants J. T. Bass, Arval Martin, Jr., and Alfred Johns are elected, voting members of the City of Cleburne City Council which is empowered under Texas law to enact municipal zoning ordinances and which is responsible for granting or denying special use permits under the City of Cleburne zoning ordinance.

8. Defendant Robert Miller is the City Attorney for the City of Cleburne, responsible for the prosecution of violations of the City of Cleburne zoning ordinance.

9. In July, 1980, Jan Hannah purchased the lot and house located at 201 Featherston Street in Cleburne, Texas (hereinafter sometimes referred to as the Featherston Street home). This property is officially described in Cleburne city records as the north two thirds of lot 1, block 498, of the City of Cleburne.

10. At the time of purchase by Jan Hannah, the Featherston Street home was in a district classified under Cleburne's zoning ordinance as an apartment house district. The use district also is called an R-3 zone. That zoning classification is still the same for the home at the time of trial.

11. On June 8, 1965, the City Council of the City of Cleburne enacted a zoning ordinance for the city which included for the first time in the city zoning ordinance the texts of §§ 8(6) and 16(9) of the current ordinance as they now read.

None of the current city council members of the City of Cleburne were members of the city council on June 8, 1965.

12. Under Section 8 of Cleburne's zoning ordinance, the following uses are all permitted uses in a district zoned R-3, including the district in which the Featherston Street home is situated:

(1) Any use permitted in District R-2.

(2) Apartment houses, or multiple dwellings.

(3) Boarding and lodging houses.

(4) Fraternity or sorority houses and dormitories.

(5) Apartment hotels.

(6) Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.

(7) Private clubs or fraternal orders, except those chief activity is carried on as business.

(8) Philanthropic or eleemosynary institutions, other than penal institutions.

(9) Accessory uses customarily incident to any of the above uses, and located on the same lot, not involving the conduct of a business or industry.

a. There shall be permitted such facilities as are customarily accessory to the operation of an apartment hotel when conducted and entered from within the building.

b. Private or storage garages, located as provided in District R-1 for private garages, may provide space for not more than one motor vehicle for each seven hundred and fifty (750) square feet of lot area. No business occupation or services connected with motor vehicles, except washing occupant autos shall be permitted.

(10) Signs as provided in Section 21.

13. Under Section 16, subdivision 9, of Cleburne's zoning ordinance, "[h]ospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions" are listed as uses requiring the issuance of a special use permit by the Cleburne city council before such use of property in the city may be made.

14. Under Cleburne's zoning ordinance, each special use permit issued is good for only one year.

15. On July 28, 1980, after being told by the responsible city officials of the necessity for doing so if they wished to operate the Featherston Street home as proposed, Jan Hannah and Bobbie Northrop paid the city $40 to apply for a special use permit. The permit was sought to operate the Featherston Street home as a "Residential Care facility for Mentally Retarded Adults".

16. On August 18, 1980, the city's Planning and Zoning Commission held a hearing and voted to deny the special use permit for the Featherston Street home.

17. Although it originally had planned to start operation of the Featherston Street home around October 1, 1980, CLC, in the face of the zoning problems with the city, postponed the planned operational date to November 1, 1980.

18. On September 29, 1980, the City of Cleburne, through its then Assistant City Attorney, Robert T. Miller, Jr., sent a letter to Bobbie Northrop stating that a special use permit was required to operate the Featherston Street home and classifying the proposed use as a hospital for the feeble-minded. Bobbie Northrop received this letter shortly after it was sent.

19. On October 14, 1980, the City Council of Cleburne held a public hearing on the special use permit application for the Featherston Street home and, in a three to one vote, voted to deny the permit application.

20. The Featherston Street home will house thirteen mentally retarded adults and will be operated by CLC as a Level I Intermediate Care Facility for the Mentally Retarded (hereinafter sometimes referred to as an ICF-MR) under extensive regulations and guidelines established and administered by the United States Department of Health and Human Services, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health.

CLC plans to comply with all applicable and valid-statutes, regulations, codes, and ordinances.

21. The structure at 201 Featherston Street is a large, one story frame house containing a living room, an alcove, a dining room, a breakfast room, a kitchen, an attic, a laundry room, four bedrooms, a den, and two baths, with a half bath to be added. It is on a corner lot, and there are front, side, and back yards, as well as a large front porch. Across the street to the north of the Featherston home is a public junior high school which numbers among its students about thirty mentally retarded children between the ages of nine and twenty one years. Directly behind the Featherston home to the south is a two story apartment house. A dentist's office is on the corner northeast of the Featherston home.

22. The people who will live in the Featherston Street home will be men and women eighteen years of age or older who are mildly or moderately mentally retarded. They will be completely ambulatory.

23. The Featherston Street home will have twenty four hour supervision, divided basically into eight hour shifts. Besides handling administrative matters, some cooking, and some cleaning chores, the staff will work with the mentally retarded residents to train and teach them in such areas as kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities. The program for each resident will be flexible, depending on his or her needs, and will be based on an individual program plan prepared for each resident of the group home by an interdisciplinary team. Although a registered nurse will visit the home once a month, there will be no licensed nursing or medical staff in the home or employed by CLC. The residents will have jobs in the community and in a work activity center. They probably will not have private automobiles. Their stay at the Featherston Street home will be voluntary, and its length will be indeterminate.

24. If the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.

25. Beginning in fiscal year 1980 (which started on October 1, 1979) and continuing in each of the next two fiscal years, the City of Cleburne has been a recipient of federal financial assistance, including financial assistance under the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 *et seq.* (hereinafter referred to as the Revenue Sharing Act). The city received revenue sharing funds equalling $203,361 in fiscal year 1980, $203,433 in fiscal year 1981, and at least $51,357 thus far in fiscal year 1982.

26. The city's city council is the principal allocator of revenue sharing funds within the city, and it is responsible to the federal Office of Revenue Sharing for the accounting of the receipt and use of revenue sharing funds.

27. Revenue sharing funds have been spent in the following ways, among others: (a) road construction; (b) the purchase of capital equipment for the city's department of public works; (c) the purchase of capital equipment for City Hall; (d) water utility systems; (e) parks and recreation; (f) debt service; and (g) library materials.

28. A civil rights complaint against the City of Cleburne, alleging that the zoning ordinance and the denial of the special use permit that are at issue in this case violate the Revenue Sharing Act antidiscrimination provisions, was filed with the federal Office of Revenue Sharing by Cleburne Living Center, Inc., on its own behalf and on behalf of the mentally retarded potential residents of the Featherston Street home. The Office of Revenue Sharing received the complaint on September 29, 1981, and, as of March 22, 1982, a determination had not been made or issued by that federal office with respect to the complaint.

29. The city council's vote on October 14, 1980, as well as the city Planning and Zoning Commission's earlier vote

on August 18, 1980, to deny a special use permit for the Featherston Street group home was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.

30. Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

31. No group homes or hospitals for persons who are mentally retarded are in Cleburne. One is, however, located in Keene, Texas. Keene is also in Johnson County and is approximately 15 minutes by automobile from Cleburne.

32. Persons who are mentally retarded historically have been subjected to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements.

33. None of the named Plaintiffs themselves are developmentally disabled.

34. Members of the City Council of Cleburne considered the following factors in their decision to deny Plaintiffs a special use permit for the house at 201 Featherston Street:

a. the attitude of a majority of owners of property located within two hundred (200) feet of 210 Featherston;

b. the location of a junior high school across the street from 201 Featherston;

c. concern for the fears of elderly residents of the neighborhood;

d. the size of the home and the number of people to be housed;

e. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

f. the home's location on a five hundred (500) year flood plain; and

g. in general, the presentation made before the City Council.

35. Plaintiffs were given a full and fair opportunity to voice their views to the City Council concerning their application for a special use permit.

36. In their operation of the group home, Hannah and CLC planned to obtain fees from the residents, and in the event that the residents were unable to pay, subsidies from Medicaid. A Level I Intermediate Care Facility program in Texas is a Medicaid funded program.

37. ICF-MRs are required by the State of Texas to meet certain certification requirements set forth in Plaintiffs' Exhibit 25. CLC preliminarily sought certification of its proposed facility. On or about July 21, 1980 the Texas Department of Health indicated to Mr. David Southern, a one-third shareholder in CLC, that the house at 201 Featherston would be an "adequate" ICF-MR Level I facility provided that certain repairs and modifications were made to the house. Because of the onset of this litigation, however, the requirements for certification were not completed and the Texas Department of Health has stated its intention to toll the one-hundred and twenty day period for the completion of the requirements pending the outcome of the litigation.

38. Subsequent to CLC's application for certification of the ICF-MR in Cleburne, the Texas Department of Human Resources issued new regulations with reference to ICF-MRs. The new regulations (see Defendant's Exhibit 10) state that certification as an ICF-MR will be limited to

"six beds per facility." David Southern claims that state officials have agreed that the new regulation does not apply to the Cleburne facility retroactively.

39. Currently, the house at 201 Featherston will require approximately $8500.00 in repairs and modifications in order to meet certification requirements that have gone into effect since October of 1981.

40. The lease of 201 Featherston from Jan Hannah to CLC requires that the premises be used for "a residential training facility for the adult mentally retarded" and no other purpose. Because of the denial of the special use permit, in January of 1981 Hannah and CLC agreed to modify the terms of the lease. CLC continues to pay Hannah $600 per month for the future right to utilize the lease as originally planned. The original lease called for the payment of $1300.00 per month.

41. There is no evidence that any of the federal funds received by the City of Cleburne pursuant to the Revenue Sharing Act are used to exercise the city's zoning powers. Further, the evidence is clear and convincing that, of the federal funds received by the city, none are used to exercise the city's zoning powers.

42. At all times material to the actions described above, each named individual Defendant was serving in his official capacity as an employee of the City of Cleburne, Texas. Further, at all times material to the actions described above, each named individual acted at all times in the due performance of his official duties and, in good faith, believed that he was carrying out those duties in a proper manner.

II. CONCLUSIONS OF LAW

A. *Introduction*

Plaintiffs predicate this action upon the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 *et seq.*, (hereinafter Federal Revenue Sharing Act) and the

Fourteenth Amendment to the United States Constitution. In particular, Plaintiff CLC claims that Defendants have violated the nondiscrimination provision of the Federal Revenue Sharing Act, 31 U.S.C. § 1242(a) (1),[1] which incorporates the prohibitions found in the Rehabilitation Act, 29 U.S.C. § 794, pertaining to "otherwise qualified handicapped individual[s]."[2] The Defendant City challenges CLC's standing to bring the claim and further asserts § 1242(a) (2) (A)

---

[1]31 U.S.C. § 1242(a)(1):

No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a state government or unit of local government, which government or unit receives funds made available under subchapter I of this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualifi d handicapped individual as provided in section 794 shall also apply to any such program or activity. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or Title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program or activity.

[2]29 U.S.C. § 749:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

of the Revenue Sharing Act[3] as a defense. All Plaintiffs assert Fourteenth Amendment challenges to the city's zoning ordinance, as written and as applied. In particular, Plaintiffs claim the acts of the Defendants amount to a denial of equal protection, a denial of procedural and substantative due process, and an infringement of Plaintiffs' constitutional rights to travel and freedom of association. Defendants challenge the standing, both constitutional and prudential, of these litigants to assert the claims in question. In the alternative, Defendants assert that the ordinance as written and in operation suffers from no constitutional infirmities.

B. *The Revenue Sharing Act and Rehabilitation Act Claim*

1. *CLC's standing.* CLC raises this claim in its own right and in behalf of the group home's potential residents. The Revenue Sharing Act provision conferring standing for private civil actions states in pertinent part

> "Whenever ... a unit of local government ... has engaged or is engaging in any act or practice prohibited by this chapter [e.g., 31 U.S.C. § 1242 (a) (1)] ... a civil action may be instituted by the person aggrieved ..."

31 U.S.C. § 1244(a). *(emphasis added)* It is undisputed that CLC has properly exhausted its administrative remedies prior to the institution of this action. Congress, of course, may not abrogate the basic Article III standing requirements by statute. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 60 L.Ed.2d 66 (1979). Yet, it is

---

[3]31 U.S.C. § 1242(a)(2)(A):

The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under subchapter I of this chapter.

apparent that CLC has shown injury in fact which can be redressed if the requested relief is granted. Further, the Court is ever mindful of the remedial purposes of the Act, and is hesitant to give the Act a narrow reading in light of its purposes. It is also without doubt that the interests asserted by CLC in this action fall within the "zone of interests" sought to be protected by the statute. *See Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 25 L.Ed.2d 184 (1970). The Court finds further support in recent Supreme Court cases addressing the issue of statutory standing under the Fair Housing Act, 42 U.S.C. § 3601 *et seq. Havens Realty Corp. v. Coleman*, —U.S.--, 71 L.Ed. 2d 214 (1982); *Gladstone Realtors, supra; Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 34 L.Ed.2d 415 (1972). Defendants contend, however, that none of the Plaintiffs are "otherwise qualified handicapped individual[s]" and that therefore they cannot be "persons aggrieved" within the meaning of the Act. The Court does not read this limitation into the Revenue Sharing Act. Instead, the Court concludes that the term "person aggrieved" indicates a willingness on the part of Congress to extend standing under the Act to all entities which can satisfy traditional Article III requirements. For the reasons set forth below, the Court concludes that CLC satisfies those requirements, including the prudential requirements for *jus tertii* standing in behalf of mentally retarded adults who are potential residents, or "clients" of the group home. In sum, CLC has standing to bring this action in its own right and on behalf of potential residents of the group home.

2. Section 1242(a) (2) (A). Defendants contend that they have demonstrated by clear and convincing evidence that the city's zoning activities are not funded in whole or in part by federal funds provided pursuant to the Revenue Sharing Act. There can be little doubt from the literal language of the Act that its prohibitions are "program specific." *Cf. North Haven Board of Education v. Bell*, —U.S.—, 50 U.S.L.W. 4501 (1982); *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). It is

undisputed that the burden of the section 1242(a) (2) (A) defense falls upon Defendants. Defendants rely exclusively upon Plaintiffs' Exhibit Five (5), a breakdown of the city's expenditures of Revenue Sharing Act funds for the years 1979-1981. The exhibit shows that the city has spent the funds in question upon roads, police, parks and recreation, water and debt service. Apparently not all of the funds have been expended as there is a net positive balance. It is, of course, true that the city council has been the official recipient and "trustee" of the funds. (But this fact, without more, fails to rebut the force of Plaintiff's Exhibit Five. To conclude that the prohibitions against discrimination incorporated into the Revenue Sharing Act from the Rehabilitation Act are applicable to the mere exercise of the city's zoning powers, without any further proof of a nexus between the exercise of those powers and the disbursement of Revenue Sharing Act funds, would eviscerate the "program specific" nature of the Act. In sum, Plaintiffs attempt to place a square peg in a round hole. The Defendants have shown by clear and convincing evidence that the zoning decisions in question were not funded in whole or in part with Revenue Sharing Act funds. Hence these claims will be dismissed on the merits.

C. *The Constitutional Claims*

1. *Standing.* There are four named Plaintiffs in this action who assert standing to litigate the constitutional claims: CLC; Jan Hannah; Johnson County Association for Retarded Citizens; and Advocacy, Inc. Only Hannah and CLC claim a right to money damages. All Plaintiffs seek *jus tertii* standing on behalf of adult mentally retarded citizens who are potential residents at the group home.

CLC and Jan Hannah have clearly shown that they have standing in their own right to assert the constitutional claims. Each has suffered injury in fact as a direct result of Defendants' conduct. Each has a personal stake in the outcome sufficient to assure the "concrete adverseness"

required by Article III. Finally, the requested injunctive relief would ameliorate the particular alleged injury. For these reasons then, *see e.g. Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 50 L.Ed 2d 450 (1977), *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975), *Baker v. Carr*, 369 U.S. 186, 7 L.Ed. 2d 663 (1962), the Court concludes CLC and Hannah may bring this action in their own right.

In addition, the Court is also of the opinion that CLC and Hannah have standing to litigate the constitutional rights of mentally retarded citizens who are potential residents of the proposed group home. Limitations on a litigant's assertion of *jus tertii* standing are not constitutionally mandated, but instead stem from a salutory "rule of self restraint." *Craig v. Boren*, 429 U.S. 190, 50 L.Ed.2d 397 (1976). CLC and Hannah are virtually indistinguishable from the vendors in *Carey v. Population Services Int'l.*, 431 U.S. 678, 52 L.Ed. 2d 675 (1977), *Craig, supra*, and *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed.2d 349 (1972). On this authority the Court concludes Hannah and CLC are proper litigants to champion the constitutional rights of adult mentally retarded citizens who are potential residents or "clients" of the group home. *See also Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1036 (5th Cir. 1980).

The Court reaches a different conclusion with regard to the Johnson County Association for Retarded Citizens. The record is devoid of any sufficient injury, economic or non-economic, to the Association which would justify its inclusion into this litigation. *See Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636 (1972). Further, there is no evidence that the Defendants' conduct has in any way adversely affected the associational ties of the association's members. *Id.* For these reasons then the Johnson County Association for Retarded Citizens will be dismissed from this litigation.

Advocacy Inc., an independent state agency created pursuant to 42 USC § 6012, also has standing to represent adult

mentally retarded citizens who are potential residents of the group home. *See Goldstein v. Coughlin*, 83 FRD 613 (W.D. N.Y. 1979); *Naughton v. Bevilacgua*, 458 F.Supp. 610, 617 (D.R.I. 1978). *But see Developmental Disabilities Advocacy Center, Inc.*, 521 F.Supp. 365 (D.N.H. 1981). This is especially appropriate where, as is true in the instant case, Hannah and CLC have shown that they are proper litigants according to constitutional and prudential standing requirements. Advocacy Inc., however, is not a proper litigant insofar as it purports to represent the individual interests of Hannah and CLC.

2. *Equal Protection*

Plaintiffs assail the city's zoning ordinance, as written and as applied, on grounds that it denies mentally retarded citizens their rights to equal protection. In accordance with traditional equal protection analysis, the Court first notes that the ordinance in question and the denial of the special use permit do not impact upon any fundamental right guaranteed to Plaintiffs by the United States Constitution. Hence, the Court focuses upon whether the ordinance, as written and as applied, creates a suspect classification. There can be little doubt that Cleburne's zoning ordinance selectively discriminates against the "insane or feeble minded."

The traditional factors for the determination of a suspect class are found in *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 36 L.Ed.2d 16 (1973). Although classification according to mental retardation has never been examined by the Supreme Court, *see Schweicker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981), several lower courts have considered similar issues and arrived at conflicting results. For example, some Courts have rejected the contention that the mentally retarded are a suspect class, *Doe v. Colaulti*, 454 F.Supp. 621, 632 (E.D. Pa. 1978), *aff'd* 592 F.2d 704 (3rd Cir. 1979), *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973), while others have stated that the mentally retarded constitute a "quasi-sus-

pect" class prompting a heightened standard of review. *Sterling v. Harris*, 478 F.Supp. 1046, 1053 (N.D. Ill. 1979), *rev'd on other grounds sub nom. Schweiker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981). *Frederick v. Thomas*, 408 F.Supp. 823, 836 (E.D. Pa. 1976); *Fialkowski v. Schapp*, 405 F.Supp. 946, 958-59 (E.D. Pa. 1975) *(dictum)*. The Court is of the opinion that mental retardation is not a suspect or quasi-suspect class prompting strict or heightened judicial scrutiny. In support of its conclusion the Court adopts the reasoning of the Third Circuit Court of Appeals in *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979). Accordingly, Cleburne's zoning ordinance will be afforded a presumption of validity and upheld if it can be shown to bear some rational relationship to the city's legitimate purposes or interests. *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 40, 55, 36 L.Ed.2d 16, 47, 56 (1973).

Subjected to this limited standard of review, the Court finds that the ordinance, both as written and applied, passes constitutional muster. Certainly the city has a legitimate interest in the location of a group home intended for the purpose of housing thirteen adult mentally retarded citizens. Cleburne does not absolutely bar such concerns in its jurisdiction, but instead merely exercises authority with regard to the location of such a home. The location of the group home raises many legitimate concerns with the city and its residents. Such concerns were voiced in the political process leading to the denial of the special use permit. In particular, the Court focuses upon the legal responsibility of CLC and its residents, as well as the safety and fears of residents in the adjoining neighborhood. Opponents of the special use permit also viewed the number of residents and the particular structure in which they were to be housed with skepticism. It should be noted that subsequent to the denial of the permit, the State of Texas, through its Department of Health Resources, has proposed and adopted Rule 326.35.03.005 which limits its certification of ICF-MRs to those which have six beds per facility or less. In sum, the Court is constrained to conclude that the zoning ordinance

as written and as applied to Plaintiffs, is rationally related to legitimate purposes and interests of the City of Cleburne. It is not arbitrary, capricious or irrational.

3. *Due Process — Police Power*

Plaintiffs contend that the City of Cleburne has exceeded its legitimate police powers by virtue of the zoning ordinance, as written and as applied. In particular, Plaintiffs assert the ordinance and the decision to deny a special use permit bear neither a rational nor substantial relationship to the public health, safety morals, or general welfare. *See e.g. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 71 L.Ed. 303 (1926); *Couf v. DeBlaker*, 652 F.2d 585, 588 (5th Cir. 1981); *Wheeler v. City of Pleasant Grove*, 644 F.2d 99, 100 (5th Cir. 1981). The Supreme Court has recently noted that the power of local governments to zone and control land use is undoubted and that its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. *Schad v. Borough of Mt. Ephram*, 452 U.S. 61, 68 L.Ed.2d 671, 680 (1981). At this point it is appropriate to distinguish between the interests asserted by Hannah and CLC in their own right as opposed to the interests asserted in their representative capacity. Hannah and CLC have an economic property interest in their own right. In their representative capacity they assert alleged liberty interests on behalf of mentally retarded adults who are potential residents or clients of the group home. In *Schad, supra*, the Supreme Court stated that where property interests are at stake, the ordinance need only be rationally related to legitimate concerns and not deprive the owner of economically viable use of the property. 452 U.S. at 68. Where a protected liberty interest is at stake, the ordinance must be narrowly drawn and further a sufficiently substantial government interest. *Id.*

The Cleburne ordinance, with respect to the individual interests of Hannah and CLC suffers from no constitutional infirmity. As discussed in section 2 above, the ordinance is rationally related to legitimate concerns of the city. Further,

it does not deprive the owners of economically viable use of the property. Accordingly, Cleburne's ordinance is without constitutional infirmity with regard to the property interests asserted by Hannah and CLC.

The exercise of the city's inherent police powers with respect to the liberty interests of potential residents of the group home requires a more lengthy discussion. It is important to bear in mind that all the City of Cleburne has done is to reject a potential site for a group home. As was discussed earlier, the Court has rejected Plaintiffs' contentions that mentally retarded citizens constitute a suspect class. Plaintiffs, however, additionally contend that the ordinance and the decision to deny the special use permit, impinge upon freedoms of association and travel. The Supreme Court has rejected similar contentions in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9, 39 L.Ed.2d 797, 803-04 (1974). Cleburne has merely denied Plaintiffs the right to conduct their business at a specific location in the City. Other locations are available and the Court can find no impingement upon constitutionally guaranteed rights of association and travel. For these reasons, it appears that the "liberty interest" test set forth in *Schad, supra* is inapplicable to the facts of this case. Under the limited standard of review governing mere property interests, the Court has already concluded the ordinance and denial of the special use permit withstand scrutiny. Further, were the court to apply the heightened state of review enunciated in *Schad*, the Court would likewise approve of the ordinance and denial of the special use permit. Cleburne's interest in selectively locating homes for the mentally retarded is substantial — the evidence indicates a concern for not only the rights of adjoining landowners but also for the potential residents of the home. The ordinance is drawn as narrowly as possible to accommodate these interests.

Finally, the Court notes that the facts of this case bear little resemblance to those in *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 52 L.Ed.2d 531 (1977) and *State of Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73

L.Ed. 210 (1928). In *Moore*, the Court emphasized the government's intrusion into the "extended family" living arrangement and concluded that the ordinance in question did little to further the interests claimed by the government. There has been no similar showing in the case at bar. In *Roberge*, the Court concluded that a governmental entity may not constitutionally delegate its entire zoning powers to the owners of adjoining land. Although the city council of Cleburne was heavily influenced by the opinions of adjoining landowners, it is abundantly clear that the city did not completely delegate its police powers. In sum, the Court concludes that the city's conduct was a proper and permissible exercise of its police powers.

4. *Due Process — Vagueness*

Plaintiffs also assail the Cleburne zoning ordinance on grounds that it is impermissibly vague. Nothing that section 27 of the ordinance provides criminal penalties for its violation, Plaintiffs focus the Court's attention to the variance found in the two pertinent sections, §§ 8, 16, with regard to "home" and "hospital". Plaintiffs additionally offer the Court various hypothetical situations which could result in ambiguity under the city's zoning laws as a whole.

At the outset of its analysis, the court notes that on the facts of this case the ordinance does not " 'abut upon sensitive areas of basic First Amendment freedoms'." *Grayned v. City of Rockford*, 408 U.S. 104, 109, 33 L.Ed.2d 222, 228 (1972), [quoting *Smith v. Goguen*, 415 U.S. 556, 572-73, 39 L.Ed.2d 605 (1974)]. Accordingly the law does not demand the greater degree of specificity reserved for the protection of First Amendment freedom. *Parker v. Levy*, 417 U.S. 733, 41 L.Ed.2d 439 (1974). In fact, the ordinance in question is more appropriately characterized as an economic regulatory statute. The standard for its validity is set forth in *Parker, supra*:

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that

> statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation.
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

417 U.S. 733, 757, 41 L.Ed.2d 439, 458 (1974). [*quoting United States v. Nat'l. Dairy Corp.*, 372 U.S. 29, 32-33, 9 L.Ed.2d 561 (1963)]. Under this limited standard of review the Court finds that the ordinance withstands constitutional assault. The Court has little to no difficulty in construing sections 8 and 16 to include the proposed group home despite the minor variance of terms ("home" v. "hospital") therein. A person of ordinary intelligence can reasonably understand that sections 8 and 16 require a special use permit for the operation of a for-profit group home for mentally retarded adults. Any ambiguity is minute.

On the facts of this case, it is beyond peradventure that Plaintiffs received clear and sufficient notice of the city's prohibitions. Accordingly, there is some doubt as to whether Plaintiffs may raise the vagueness claims, especially in the absence of an impingement upon First Amendment freedoms. *See Parker v. Levy*, 417 U.S. 733, 756, 41 L.Ed.2d 439, 458 (1974) (one to whose conduct a statute clearly applies may not successfully challenge it for vagueness). In any event, it is amply clear that the Court need not engage in speculation concerning hypothetical fact situations and their disposition under the ordinance. In short, the Court concludes that sections 8 and 16 of the ordinance are not impermissibly vague. The Court is reminded of the Supreme Court's opinion

in *Grayned, supra* where it was stated that "condemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110, 33 L.Ed.2d at 228-29.

5. *Freedom of Association and Right to Travel.*

By these claims Plaintiffs would have the Court read much more into Defendants' conduct than the record reflects. Cleburne is merely exercising its inherent policy powers to approve or disapprove of the specific location of Plaintiffs' business endeavor. The city does not bar group homes for mentally retarded citizens from its jurisdiction and neither does it inhibit their rights to associate. In sum, mentally retarded citizens are free to live and associate in Cleburne, Texas. The city has merely prohibited the establishment of a for-profit group home for 13 mentally retarded citizens at one specific location. As has been discussed above, the city has a significant and substantial interest in the ultimate location of the home. Plaintiffs' contentions are simply without merit.

D. *Conclusions*

The Court finds no statutory or constitutional infirmities in the Cleburne zoning ordinance, as written and as applied. Accordingly, judgment for Defendants on all claims will enter.

Signed and entered this 4th day of October, 1982.

United States District Judge

U.S. District Court
Northern District of Texas
F I L E D
Oct. 4, 1982
Joseph McElroy, Jr., Clerk
By Pam Hill
Deputy
No. CA3-80-1576-F

In The

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JUDGMENT

This action came on for trial before the Court, Honorable Robert W. Porter, United States District Judge, and the issues having been duly tried and a decision having been rendered,

It is ORDERED and ADJUDGED that the Plaintiffs, Cleburne Living Center, Inc., et al., take nothing and that the action be dismissed on the merits.

Signed this 4th day of October, 1982.

_____

United States District Judge

C-1

CLEBURNE LIVING CENTER, INC., et al., Plaintiffs-Appellants,

v.

CITY OF CLEBURNE, TEXAS, et al., Defendants-Appellees.

No. 82-1565.

United States Court of Appeals,

Fifth Circuit.

March 5, 1984.

Suit was brought challenging validity of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district." The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered judgment denying plaintiffs relief, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance could not be challenged under the Act, and (2) zoning ordinance was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis.

Affirmed in part and reversed and remanded in part.

1. United States — 82(2)

Zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" could not be challenged under the Act. 31 U.S.C.A. § 6716.

2. Constitutional Law — 213.1(2)

Three degrees of scrutiny are applied by courts in analyzing statutes challenged under equal protection clause: if a legislative classification disadvantages a "suspect class" or

impinges upon exercise of a "fundamental right," then courts will employ strict scrutiny and statute must fall unless government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest; if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, it will be treated under intermediate scrutiny and statutory classification must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand such scrutiny; if neither strict nor intermediate scrutiny is appropriate, then statute will be tested for mere rationality. U.S.C.A. Const.Amend. 14.

3. Constitutional Law — 242.1(5)

Mentally retarded persons are a "quasi-suspect" class and laws discriminating against the mentally retarded should be given intermediate scrutiny. U.S.C.A. Const.Amend. 14.

4. Constitutional Law — 228.2

Zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis. U.S.C.A. Const.Amend. 14.

5. Constitutional Law — 42.2(2)

Organization which aimed to improve welfare and treatment of the mentally retarded, which never identified any individuals who actually desired to live in mental retardates' group home and which failed to prove a sufficient injury to its own interests, lacked standing to challenge constitutionality of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" in its own right or as a representative of its members.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions. Thus, blacks were unable to disprove racist stereotypes so long as they were excluded from white neighborhoods and their children were isolated in segregated schools.

Moreover, the effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. Courts have carefully scrutinized legislation that discriminates against politically impotent groups, for under those circumstances the danger is great that the statute will reflect and enshrine untrue stereotypes.

In the present case, we are faced with the isolation of just such a group — the mentally retarded, i.e. persons who possess certain learning disorders[1] but who are to be dis-

---

[1]As an expert, Dr. Phillip Roos, stated at trial:

A: Essentially mental retardation is a problem of learning. It is manifested particularly in difficulty with abstract thinking, judgment and problem solving and includes social adjustment and economic productivity.

Q: How do you decide if a person is mentally retarded?

A: We use basically three criteria: Measured intelligence, adaptive behavior and medical classification.

. . . . . .

Q: Are there different degrees or levels of mental retardation?

A: Very definitely. There is a wide variability among retarded individuals. The mildest level of mental retardation, referred to as mild mental retardation, these are individuals whose intelligence is roughly between an IQ of 50 and an IQ of 70. This includes approximately eighty-nine percent of all mentally retarded people. Roughly nine out of ten mentally retarded people are mildly retarded.

Moderate mental retardation, IQ's of roughly 35 to 50, include six percent of the population. Severe mental retardation, IQ's 20 to 35, profound mental retardation, IQ below 20, these two categories combined include only about five percent of the population.

Trial Transcript at 137-38, 140.

tinguished from the "mentally ill."[2] A zoning ordinance of Cleburne, Texas, excludes mental retardates' group homes from the permitted uses in the "apartment house district." The owners of a proposed group home challenged the ordinance under the Federal Revenue Sharing Act and the Equal Protection Clause of the Fourteenth Amendment. We reject the Revenue Sharing Act claim, because zoning was not a "program or activity" receiving federal funds. In evaluating the Equal Protection claim, we hold that mental retardates constitute a "quasi-suspect" class; and, therefore, we test the ordinance according to the "intermediate" level of scrutiny established by the Supreme Court. Because the city has failed to prove that the ordinance substantially furthers a significant governmental interest, we hold that the ordinance violates the Equal Protection Clause.

I. FACTS

In July, 1980, Jan Hannah purchased a house at 201 Featherston Street in Cleburne, Texas. Hannah is the Vice President and part-owner of Cleburne Living Centers, Inc. ("CLC"), a Texas corporation organized for the purpose

---

[2]Dr. Roos also explained that mental retardation is not a mental illness.

> Q: Is mental retardation a type of mental illness?
>
> A: No, sir. It's an entirely different condition requiring entirely different approaches.
>
> Q: Well, how do they differ?
>
> A: Mental retardation is a problem of a deficit in intellectual development and social adaption. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.
>
> Mental illness, on the other hand, is a disorder of thinking, of emotions and of behavior. It can occur anytime in life, often after a period of normal development. It is primarily a psychiatric, rather than an educational problem, and often it is reversible. That is, it is potentially curable in many cases.

Trial Transcript at 138-139.

of establishing and operating supervised group homes for the mentally retarded. Hannah bought the Featherston house for the purpose of leasing it to CLC for the operation of a group home, classified as a Level I Intermediate Care Facility.

The home would house thirteen men and women who are mildly or moderately retarded. They would receive twenty-four hour supervision from CLC staff members, working eight-hour shifts. In addition to handling some cooking and cleaning, the staff would work with the mentally retarded residents to train them in such skills as "kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities."[3] An interdisciplinary team of staff workers would prepare an individualized program for each resident, based on his or her particular needs. The residents would have jobs in the community and in a work activity center. They would probably not have private cars. Their stay at the home would be voluntary, and the length of the stay indeterminate.

As a Level I Intermediate Care Facility, the Featherston home would be subject to extensive regulations and guidelines established and administered by the United States Department of Health and Human Resources, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health. CLC plans to comply with all applicable and valid statutes, regulations, codes, and ordinances. *Cleburne, supra* note 3, at 6, Finding 20.

For mentally retarded persons living in the 1980's, the existence of group homes is critical to assimilation into the normal culture. As the trial court found,

> Group homes currently are the principal community living alternatives for persons who are mentally

---

[3] *Cleburne Living Center v. City of Cleburne*, No. CA 3-80-1576-F, slip op. at 7, Finding 23 (N.D.Tex. April 16, 1982).

> retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne Living Center v. City of Cleburne, *supra* note 3, at 9, Finding 30. At present, there are no group homes or hospitals for the mentally retarded in Cleburne. One is located in Keene, Texas, approximately 15 minutes by automobile from Cleburne.

II. THE ORDINANCE.

Section 8 of Cleburne's zoning ordinance lists the permitted uses in a district zoned R–3:

> 1. Any use permitted in District R–2.
>
> 2. Apartment houses, or multiple dwellings.
>
> 3. Boarding and lodging houses.
>
> 4. Fraternity or sorority houses and dormitories.
>
> 5. Apartment hotels.
>
> 6. *Hospitals*, sanitariums, nursing homes *or homes for* convalescents or aged, *other than for the* insane or *feebleminded* or alcoholics or drug addicts.
>
> 7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
>
> 8. Philanthropic or eleemosynary institutions, other than penal institutions.
>
> 9. Accessory uses customarily incident to any of the above uses. . . .

Id. at 4, Finding 12 (emphasis added).

Section 16, subdivision 9, of the same ordinance requires that special use permits be obtained for "*hospitals for the*

insane or *feeble-minded*, or alcoholic or drug addicts, or penal or correctional institutions" that are to be operated anywhere in the city. *Id.* at 5, Finding 13 (emphasis added). Because the Featherston house is located in an R-3 zone and, more generally, because it is located anywhere within Cleburne, its use as a group home is not automatically permitted but requires a special use permit from the Cleburne City Council. Under the zoning ordinance, each special use permit is valid for only one year; so the owners of the Featherston house would have to reapply year after year.

III. PROCEEDINGS BELOW

On July 28, 1980, Hannah applied for a special use permit. The Cleburne Planning and Zoning Commission held a hearing and denied the permit. On October 14, 1980, the City Council of Cleburne held a public hearing on the permit application and again voted (3-1) to deny the permit. The Council members considered the following factors:

1. the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston;

2. the location of a junior high school across the street from 201 Featherston;

3. concern for the fears of elderly residents of the neighborhood;

4. the size of the home and the number of people to be housed;

5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

6. the home's location on a five hundred (500) year flood plain; and

7. in general, the presentation made before the City Council.

After exhausting administrative remedies, Hannah and the CLC sued for injunctive relief and damages, in the United States District Court for the Northern District of Texas. They were joined by the plaintiffs Johnson County Association for Retarded Citizens (JCARC) and Advocacy, Inc. in asserting the constitutional rights of mentally retarded

persons who were potential residents of the facility. JCARC is an organization that aims to improve the welfare and treatment of the mentally retarded. Advocacy, Inc. is a non-profit corporation that provides legal services to developmentally disabled persons.

The defendants in the suit include the City of Cleburne and individual city employees and council members. After a bench trial, the district judge entered judgment denying the plaintiffs relief on each of the grounds they had claimed. This appeal follows.

IV. ISSUES ON APPEAL

The plaintiffs raise various challenges to the zoning ordinance on its face and as applied. They argue, first, that the ordinance and the special use permit denial violate the Revenue Sharing Act which prohibits discrimination against "otherwise qualified" handicapped people. 31 U.S.C. §1242(a)(1) (1982), *recodified* at 31 U.S.C.A. § 6716(b)(2) (1983).

The plaintiffs also claim that the ordinance and its application violate the Equal Protection and Due Process clauses of the Constitution.[4] We find the Revenue Sharing Act claim unconvincing in the circumstances of this case. However, we hold that the Cleburne ordinance, both on its face and as applied, denies equal protection. Therefore, we need not address the other constitutional claims. The one tangential issue that is worthy of note is the defendants' argument that JCARC lacks standing to prosecute this suit. Given the specific facts of this case, we agree. That

---

[4]The plaintiffs assert that the ordinance violates Due Process in two ways. The distinctions drawn in the statute are allegedly arbitrary and capricious, thus failing to meet the minimal rationality requirements set out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). Moreover, the plaintiffs allege that the statute is unconstitutionally vague. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

determination does not affect our decision on the merits, however, for the other plaintiffs remain in the suit.

V. REVENUE SHARING ACT

[1] The plaintiffs argue, first, that the zoning function of the Cleburne City Council is within a "program or activity" subject to the provisions of the Revenue Sharing Act. 31 U.S.C.A. § 6716 (1983). We disagree. As the trial court held, clear and convincing evidence proved that federal funds were not used to finance the zoning activities of the City Council. *See* 31 U.S.C.A. § 6716(c)(1); *see also North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926, 72 L.Ed.2d 299 (1982) ("program or activity" language in Education Amendments of 1972 makes their coverage program-specific); *Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir.1981) (receipt of federal financial assistance by multiprogram entity, for application to certain programs or activities, does not bring entire entity within the reach of Section 504 of the Rehabilitation Act); *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir.1969) (multiple programs in Title VI context).

The plaintiffs claim, however, that the City Council itself is an activity receiving federal funds, because it decides which specific city programs will ultimately receive the monies. Therefore, every action of the City Council (including zoning) is subject to the requirements of the Revenue Sharing Act. *Cf. Grove City College v. Bell*, 687 F.2d 684 (3d Cir.1982), *cert. granted* ..... U.S. ....., 103 S.Ct. 1181, 75 L.Ed.2d 429 (1983) (entire college a "program or activity" in Title IX case). We are not willing to make that leap in the circumstances of the case. Even if we assume that the City Council's function in disbursing funds subjected those decisions to the Revenue Sharing Act, there was no apparent link between that function and the Council's function in making zoning decisions. These were two entirely separate powers and should be considered separate programs.

We do not hold that a City Council could *never* be a single program or activity. We merely hold that those conditions do not exist in this case.[5]

VI. EQUAL PROTECTION

[2] The real problem with the Cleburne ordinance is that it denies equal protection both facially and as applied. In recent years, the formulaic analysis of Equal Protection claims has produced three degrees of scrutiny for courts to apply in analyzing challenged statutes. The levels are generally called "strict scrutiny," "intermediate" or "heightened" scrutiny, and "rational review," *see Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394-96, 72 L.Ed.2d 786 (1982); the choice among the three levels depends upon the nature of the statute in question. If the legislative classification disadvantages a "suspect class"[6] or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny. *Plyler v. Doe*, *supra*, 102 S.Ct. at 2394-95 and nn. 14, 15. The statute must fall unless the government can demonstrate that the "classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 2395.

If the "classification, while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties,"

---

[5]This case is distinguishable from *Grove City College*, *supra*, where the college was considered a single "program or activity" under the Educational Amendments of 1972 because students received federal tuition aid. The aid, which was not earmarked for any specific program, 687 F.2d at 696-97, would conceivably have ultimately funded every program in the college; but the case reveals no attempt by the school to prove that certain programs were not funded. Instead, the college argued that the funding was indirect, going to students rather than any program of the college itself. *Id.*

[6]The courts have identified a number of classifications as inherently suspect. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (classification by race); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage).

id., it will be tested under intermediate scrutiny. Such difficulties arise, for example, when a statute discriminates against a class which shares some of the characteristics of the suspect classes. *See id.* at 2395-97; *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S. Ct. 1459, 1463, 52 L.Ed.2d 31 (1977); Tribe, *American Constitutional Law*, 1090 (1978). To withstand intermediate scrutiny, the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976); *see also Plyler v. Doe*, *supra*, 102 S.Ct. at 2395, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality. We "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe*, *supra*, 102 S.Ct. at 2394.

[3] In deciding the appropriate level of scrutiny in this case, we note that the plaintiffs have identified no fundamental rights that are impaired by the Cleburne ordinance. Our analysis, then, is limited to whether the class of mentally retarded persons is suspect or at least possesses sufficient characteristics of a suspect class to warrant intermediate review.

Although some district courts have discussed this issue,[7] we can find no appellate opinions directly deciding the

---

[7]*See Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 473, 490 (D.N.D. 1982) (intermediate scrutiny appropriate for classifications discriminating against mentally retarded persons); *Fialkowski v. Shapp*, 405 F.Supp. 946, 957-59 (E.D.Pa. 1975) (same) (dictum); *cf. Frederick L. v. Thomas*, 408 F.Supp. 832, 836 (E.D.Pa.1976) (classification discriminating against learning disabled should be tested under intermediate scrutiny) *(dictum)*. *But see New York State Assoc. for Retarded Children v. Rockefeller*, 357 F.Supp. 752, 762 (E.D.N.Y.1973) (inmates of state institution for mentally retarded not a suspect class); *Developmental Disabilities Advocacy Center v. Melton*, 521 F.Supp. 365, 371 (D.N.H.

proper characterization of mentally retarded persons for Equal Protection analysis.[8] Therefore, we face the issue as one of first impression.

The courts have identified several indicia of the suspect classes. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973), the Supreme Court considered whether

> the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Accord, Plyler v. Doe, supra, 102 S.Ct. at 2394-95 n. 14; *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1964); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed. 1234 (1938). In *Plyler v. Doe, supra*, the Court also noted that

> [s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative

---

1981) (same); *Anderson v. Banks*, 520 F.Supp. 472, 512 (S.D.Ga. 1981) (mentally retarded persons not a "quasi-suspect" class). Some cases have discussed whether mentally *ill* persons are a suspect or "quasi-suspect" class. *See, e.g., Doe v. Colautti*, 592 F.2d 704, 710 (3rd Cir. 1979) (mentally ill not a suspect class); *Sterling v. Harris*, 478 F.Supp. 1046, 1056 (N.D.Ill.1979), *rev'd other grounds sub nom; Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) (mentally ill a "quasi-suspect" class). However, mental illness is distinguishable in significant ways from mental retardation, as we discuss *infra* at note 10. Thus, the mental illness cases offer at best only weak analogies to the case at bar.

[8] *Romeo v. Youngberg*, 644 F.2d 147, 163 n. 35 (3d Cir. 1981) *(en banc)* does suggest, however, that mentally retarded persons might be a "discrete and insular" minority deserving heightened scrutiny. See *infra* at 14. *Cf. Abrams v. 11 Cornwall Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (discrimination against mentally retarded persons is invidious).

> rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.

102 S.Ct. at 2394-95 n. 14.

Finally, if membership in the minority class is immutable, the Supreme Court is more likely to give the class special protection. *See Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269 (1979); *cf. Plyler v. Doe*, *supra*, 102 S.Ct. at 2396 (minor children of illegal aliens are not in this country voluntarily and, therefore, are not comparably situated to their parents).

Applying these tests to the case at bar, we conclude that although mental retardates are not a suspect class, they do share enough of the characteristics of a suspect class to warrant heightened scrutiny. Discrimination against the mentally retarded is likely to reflect deep-seated prejudice. They have been subjected to a history of unfair and often grotesque mistreatment. Until the 1970s, they were universally denied admittance into public schools in the United States. In addition, the Eugenic Society of America fought during the first half of this century to have retarded persons eradicated entirely through euthanasia and compulsory sterilization. *See Pennsylvania Assoc. of Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294 (E.D.Pa. 1972). Euthanasia was rejected; but thirty-two states have had statutes providing for the sterilization of retarded individuals. *Id.* at 294 n. 42; *Falkawski v. Shapp*, *supra* note 7, at 959 n. 9; O'Hara & Sanks, Eugenic Sterilization, *45 Geo.L.J. 30* (1956); *see also Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584,

71 L.Ed. 1000 (1927) (upholding Virginia compulsory sterilization law.)[9]

Mental retardates have been segregated in remote, stigmatizing institutions. *Cleburne Living Center v. City of Cleburne*, *supra* note 3, at 9, Finding 32, Trial Transcript at 142; and when permitted in society, they have often been subjected to ridicule, *id.* at 141. Once-technical terms for various degrees of retardation — e.g. "idiots," "imbeciles," "morons" — have become popular terms of derision.

These forms of mistreatment have perpetuated the historical misunderstanding of mental retardation and led to popular fears and uncertainty. The Cleburne ordinance discriminates between the mentally retarded and other groups — e.g. the elderly — that also require supervision but may establish group homes in the R-3 district without a special use permit. This distinction is likely to reflect the deep-seated historical prejudice against the mentally retarded.

In addition, mentally retarded persons have lacked political power. The trial court found that they "historically have been subjected to exclusion from the political process. . . ." *Cleburne*, *supra* note 3, at 9, Finding 32. Indeed, as of 1979, most states disqualified mentally retarded individuals from voting. Note, *Mental Disability and the Right to Vote*, 88 *Yale L.J.* 1644 (1979).[10] Furthermore, political organiza-

---

[9]The attitude of the past can be read in the words of Justice Holmes:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence . . . Three generations of imbeciles are enough.

Id. 274 U.S. at 207, 47 S.Ct. at 585.

[10]In Texas, both the state constitution and election code provide:

> The following classes of persons shall not be allowed to vote in this state, to wit:
>
> . . . . .

tions for the mentally retarded have emerged only recently and still possess relatively little power. As the Third Circuit declared n *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir.1981) (*en banc*):

> The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude. *Cf. United States v. Carolene Products*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed.2d 1234 (1938). The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process. *See J. Ely, Democracy and District*, 135-79 (1980).

Id. at 163 n. 35.

Finally, the mentally retarded deserve special consideration because their condition is immutable. Dr. Phillip Roos explained at trial that mental retardation is "irreversible." "[T]here may be some amelioration, but to date it is not a curable condition." Trial Transcript at 139.

Second: Idiots and lunatics.

Tex. Const. art. VI, § 1; Tex.Elec.Code Ann. art. 5.01 (Vernon Supp 1982). A 1982 opinion of the Texas Secretary of State limited that language to mentally retarded persons who have been adjudicated incompetent. Election Law Opinion DAD-27 (1982). The opinion relied in large part on the Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann. art. 5547-300, § 2(c) (Vernon Supp. 1982).

We do not believe, however, that the mentally retarded have suddenly become politically powerful in Texas. They are still a relatively small bloc, notwithstanding the existence of organizations like the Johnson County Association of Retarded Citizens. Moreover, their right to vote was unclear as late as 1982. The Secretary of State opinion was necessitated by a local judge's decision to bar from the polls a mentally retarded person who had not been adjudicated incompetent. *Id.* The powerlessness of the minority is especially clear in our case, for the Cleburne Ordinance was passed in 1965, long before the Secretary of State Opinion or the Mentally Retarded Persons Act.

The combination of these factors — historical prejudice, political powerlessness, and immutability — calls for heightened scrutiny of classifications discriminating against the mentally retarded. We are not prepared to say that they are a full-fledged suspect class, however. Strict scrutiny has been reserved for classifications, such as race, that "tend to be irrelevant to any proper legislative goal." *Plyler v. Doe*, *supra* 102 S.Ct. at 2394-95 n. 14. Though mental retardation is irrelevant to many policies, it *is* a relevant distinction in some cases. For example, learning difficulties may have a bearing on the types of school programs to which a child is assigned or the types of employment for which an adult is qualified. Therefore, we hold that mentally retarded persons are only a "quasi-suspect" class and that laws discriminating against the mentally retarded should be given intermediate scrutiny.[11]

---

[11]In deciding that classifications against the mentally retarded deserve heightened scrutiny, we express no view about classifications involving the mentally ill. Some courts and commentators have suggested that mentally ill persons are a suspect or quasi-suspect class. See, *e.g.*, *Sterling v. Harris*, *supra*, 478 F.Supp. at 1053; Note, *Mental Illness: A Suspect Classification*, 83 Y.L.J. 1237 (1974); but see *Doe v. Colautti supra*. The Fifth Circuit has not addressed this issue, except to say in *dictum* that the mentally ill are not a suspect class. See *Benham v. Edwards*, 678 F.2d 511, 515 n.9 (5th Cir. Unit B 1982). The Court explicitly declined to decide whether intermediate scrutiny would be appropriate. *Id.*

In any event, mental retardation is functionally different from mental illness; see *supra* note 2; and the differences cut in favor of heightened scrutiny for the retarded. Mental retardation is not an emotional disorder but a learning problem; it arguably invokes fewer safety concerns than does mental retardation. More important, mental retardation, unlike many mental illnesses, is an immutable disorder. The mentally retarded cannot be cured. *Id.*

Finally, mental illness covers a broader spectrum of disorders and is more difficult to define than mental retardation. The court in *Doe v. Colautti*, *supra*, 592 F.2d at 711, refused to grant extraordinary protection to the mentally ill:

> a class that is "large, diverse, [and] amorphous. . . . " The concept of mental illness is susceptible to much dispute, and the category encompasses a whole range of disorders, varying in character, and effects.

Mental retardation is much more narrowly defined. See *supra* note 1.

We note that heightened scrutiny is particularly appropriate in the case at bar, because the Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded. See *Plyler v. Doe*, *supra*, 102 S.Ct. at 2398; *Tribe*, *supra* at 1089-90. In *Plyler*, the Supreme Court addressed a Texas statute which withheld from local school districts any funds for the education of children who were not legally admitted into the United States. The statute also authorized local districts to exclude such children from the public schools. 102 S.Ct. at 2389. The Court held that heightened scrutiny was appropriate not only because the children shared some of the characteristics of a suspect class, but also because they were denied an important benefit. Education is not a fundamental right, *id.* at 2397, *San Antonio Independent School District v. Rodriguez*, *supra*, 93 S.Ct. at 1297; but it is important in helping such children overcome the bias against them and participate in American society

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

102 S.Ct. 2398.

In the same way, the exclusion of group homes from Cleburne operates to prevent mentally retarded persons from assimilating into and contributing to their society. The trial court found that

> [g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for per-

> sons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne, supra at 9, Finding 30. Isolated from normal community patterns, they can never hope to adapt. The resulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

The Ninth Circuit has held in an analogous case that heightened scrutiny is appropriate. *See J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir.1983). The Court reviewed a local zoning ordinance that required a special use permit before the establishment of a group home for former mental patients[12] in the R-2 zone.[13] Intermediate scrutiny was held to be applicable because the class shared some of the characteristics of suspect classes and because the ordinance denied important benefits:

> We note . . . that the benefits the ordinance restricts are the former mental patients' access to housing and rehabilitative services. While they are not fundamental rights, they like education at issue in *Plyler*, are essential to individuals' full participation in society. Indeed, for former mental patients, a reintegration into society accomplished through living, in a moderately structured setting in a residential neighborhood is an essential part of therapy.

---

[12]We are not suggesting that former mental patients are identical to the mentally retarded. *See supra* notes 2, 11. However, many of the problems (e.g. the community's fear and distrust) that face mental patients in returning to society are similar to problems faced by the mentally retarded.

[13]The Tacoma ordinance was arguably less problematic than the Cleburne ordinance, because the Tacoma law provided specific conditions for the issuance of a permit. See *id.* at 1130 n. 5. The Cleburne ordinance has no guidelines at all.

Id. at 1129.[14]

For the same reasons, we think that intermediate scrutiny is particularly appropriate in reviewing an ordinance[15] that restricts the availability of group homes for the mentally retarded.

[4] In applying that test, we hold that the ordinance is unconstitutional both on its face and as applied. First, the provision itself does not substantially further any important governmental interests. The problem lies not with the interests themselves but with the relevance of the ordinance to those interests. We will assume that all of the legislative goals asserted by the City of Cleburne are substantial. In each instance, however, there is not a sufficiently close correspondence between the goal and the ordinance's means

---

[14]Incidentally, although the court relied on these arguments to apply heightened scrutiny, it explicitly left open

> the possibility that, in a case with a record more fully developed as to the characteristics and status of former mental patients, a conclusion that they indeed constitute a suspect class might be warranted.

Id. at 1129.

[15]The City has argued that the statute does not actually exclude all such group homes but merely requires one additional procedural hurdle. In effect, there is only a possibility of exclusion. Arguably, then we should not adopt heightened review in testing the *facial* validity of the statute as opposed to its application.

Yet the same possibility obtained in both *Plyler* and *City of Tacoma*. The Texas Ordinance in *Plyler* authorized but did not require local school districts to exclude undocumented children. Indeed, the Tyler Independent School District had enrolled such children free of charge until 1977 when it required a tuition fee. 102 S.Ct. at 2389 n. 2. The Court tested the provision, however, with more than minimal scrutiny because of the potential exclusion.

More to the point, the zoning ordinance in *City of Tacoma*, like the Cleburne Ordinance, did not exclude all group homes but merely required a special use permit. The Ninth Circuit tested the statute under intermediate scrutiny again because of the possible denial of an important benefit.

Thus, the possible exclusion here is suffcient to justify our considering the importance of the restricted benefit when we analyze the statute on its face.

of achieving it. *See Craig v. Boren, supra,* 429 U.S. at 197, 200-204, 97 S.Ct. at 460 (requiring closer fit between legislative objective and statutory means than is required under rational review); Tribe, *supra* at 1083 & n. 10 (same); *see also Trimble v. Gordon, supra,* 430 U.S. at 770-71, 97 S.Ct. at 1465-66; *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 1904 n. 20, 1911 n. 48, 48 L.Ed.2d 495 (1976); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 799-80 n. 13, 39 L.Ed.2d 52 (1974). The standardless requirement of a special use permit for all group homes for the mentally retarded is both vastly overbroad and vastly underinclusive.

For example, the City claims that the objectives of the statute were:

1. to avoid undue concentrations of population;

2. to lessen congestion in the streets;

3. to ensure safety from fire and other dangers; and

4. to protect the health, safety and welfare of the City's population — in particular

   a. to protect the serenity of the existing neighborhoods,

   b. to protect neighbors from harm; and

   c. to protect the mental retardates themselves by providing an appropriate living environment.

See Brief of Appellees at 21-24.

The ordinance is irrelevant to the achievement of the first two asserted objectives. The same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded. *Cleburne, supra* note 3 at 7, Finding 24. Therefore the ordinance does not control population at all. It merely controls the learning skills of the population.

The ordinance likewise does not control traffic flow. The government has not shown that mentally retarded persons

drive more cars or receive more visitors than other people. There is no basis for concluding that traffic will be any more congested because the residents of the Featherston house are mentally retarded. One might argue (though the City has not taken this position) that traffic would be more congested because mentally retarded persons would wander into the streets. Other people do the same, however; and there is no evidence in the record that mentally retarded persons are unusually prone to cause such a hazard. We reject traffic congestion as a goal that is furthered by the ordinance.

The record also fails to support the claim that the ordinance protects the serenity of neighborhoods and shields neighbors from harm. The City produced only one story of a mentally retarded person who had caused a disruption: he had removed some mail from a neighbor's mailbox but later returned it. Moreover, this event did not even take place in Cleburne. *See* Trial Transcript at 111. Nothing in the record indicates that mentally retarded persons — and particularly those admitted into group homes — are more disruptive or dangerous than other people. On the contrary, Dr. Roos testified that the mailbox incident was not common behavior in moderately retarded persons and was just as possible in most children. *Id.* at 164. Yet public schools and homes for delinquent children are permitted in the zone. The discrimination between the mentally retarded and other persons is not explained by recourse to neighborhood serenity.

Finally, as to "safety from fire and other dangers," the City does not clarify whether mentally retarded persons will cause the dangers or require special city services when accidents occur. In either event, the City has not proved a substantial relationship between the goal and the ordinance. There is no evidence in the record that mentally retarded persons are more likely than other people to light fires (or cause other hazards). It is conceivable that they might require special care in an emergency. However, the City has never shown that they require more supervision than

groups like the elderly whose nursing homes are permitted in the R-3 zone without permits. Nor has the City shown that the existing supervisors in the Featherston house would provide inadequate care. To treat all homes for the mentally retarded as non-permitted uses is an excessively blunt instrument for achieving fire safety. The City could more appropriately solve this problem by requiring a certain number of caretakers per resident or by setting limits on occupancy. Such requirements already exist in federal and state regulations. *See Cleburne, supra* note 3, at 6, Finding 20. There is no reason why the City cannot be more specific in delineating its concerns.

The same objection can be raised to the City's general claim that the ordinance serves to protect the health, safety, and welfare of mentally retarded persons — by insuring, for example, that group homes are well constructed, safely located, and not over-crowded. The City could serve these interests in a much more direct manner by setting specific requirements to guide the judgment of the City Council. The alternative (embodied in the Cleburne ordinance) of giving the city council complete discretion to bar all group homes is too dangerous. There is too great a potential for blanket discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home. We cannot sanction such unbridled discretion in dealing with a class that has suffered a history of mistreatment and political impotence. The Cleburne provision requiring a special use permit for mental retardates' group homes is facially invalid under the Equal Protection Clause.

That holding alone would be sufficient to decide this case. The ordinance provision was unconstitutional; therefore it could not be invoked to exclude the Featherston Home. However, even if the statute were facially constitutional, the City Council's decision in this case would have violated equal protection. Again, the decision must be tested under intermediate scrutiny; and we hold that the denial of a permit for the Featherston Home did not substantially

further any important government interest justifying the discriminatory classification.

The factors going into the Council's decision were:

(a) the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;

(b) the location of a junior high across the street from 201 Featherston;

(c) concern for the fears of elderly residents of the neighborhood;

(d) the size of the home and the number of people to be housed;

(e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

(f) the home's location on a five hundred (500) year flood plain; and

(g) in general, the presentation made before the City Council.

Cleburne, supra note 3, at 9-10, Finding 34.

The final factor (g) is too ambiguous to justify discrimination; and two more (a and c) do not serve substantial interests. The prejudices and fears of neighbors are not in themselves ligitimate bases for discrimination.

The location of a junior high across the street from the Featherston Home (factor b) raises an arguable concern that the students would tease or abuse residents of the home. However, that danger seems minimal, since about thirty students are themselves mentally retarded. *Cleburne, supra,* note 3, at 6, Finding 21. More important, the very purpose of living in a community group home is to confront and learn to handle society's obstacles. If we accept that the hostility of junior high students is a substantial concern, then any hostility may become the justification for denying

a use permit. In effect, prejudice becomes its own excuse. We cannot accept that as a substantial interest, particularly given the speculative, unsupported nature of the City's allegations.

The size of the home and the number of people to be housed are important interests; but they are not substantially served by denying the permit in this case. The Featherston Home has four bedrooms and two baths and will house thirteen people. The structure contains 2700 square feet and is located on a lot that is 156 feet long by 103 feet wide. Citing a recent Texas regulation that limits group homes to six residents, the City argues that residents of the Featherston Home will be too crowded. The regulation only applies to applications made after May 1, 1982 and, therefore, does not govern the Featherston Home; but the City feels that the regulation indicates the needs of mentally retarded persons. However, the existence of the regulation does not explain Cleburne's discrimination between the mentally retarded and others. The City never justifies its apparent view that other people can live under such "crowded" conditions when mentally retarded persons cannot. Moreover, assuming that the City would be comfortable with six residents, it has never justified the difference between six and thirteen persons. The only discussion of this question came from Dr. Roos who knew of "no research evidence indicating that a group home with six does a better job than a group home with fifteen." Trial Record at 161. In sum, the City has never proven that the mentally retarded have unusual space needs or that denying the Featherston permit serves that interest.

The stated goal of insuring CLC's legal responsibility for the actions of its residents is not sufficiently important. Nowhere in the briefs or the record do we find an explanation why mental retardates alone must prove their financial solvency to live in Cleburne. Nor do we find any explanation of how CLC fell short.

Finally, the argument that the Home would be in a 500 year flood plain seems somewhat strained. Though the safety of the residents is important, the danger of a flood every five hundred years is not particularly great.

In sum, none of the proffered reasons for denying the Featherston permit substantially served an important government interest. The application of the ordinance denied equal protection.

VII. STANDING OF JCARC

[5] The Johnson County Association of Retarded Citizens has asserted standing to litigate this suit in its own right and as a representative of its members. The trial court held that the association had failed to prove any injury to itself or to its members. Therefore, it failed to satisfy the requirements for standing.

We affirm, for the reason given by the trial court. The JCARC has not shown any injury to its members. Although it claims that some of its members are potential residents of the Featherston Home, it has never identified any individuals who actually desire to live there. Thus, it is impossible to tell if any of the members were actually harmed by the City Council's action. *See Warth v. Seldin;* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

Nor has the JCARC proven a sufficient injury to its own interests. The association's activities include "promoting the general welfare of mentally retarded people, fostering the development of programs on their behalf, and advising and aiding parents of mentally retarded persons in the solution of their problems in this area." Brief of Appellant at 3. In particular, the JCARC favors the development of group homes; and the City Council's decision allegedly impairs this interest. However, the association's interest seems no different from that of the low-income housing association denied standing in *Warth v. Seldin, supra.* The injury to the JCARC's "abstract social interests" is too intangible to

justify standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

The association would have standing if it proved that (1) it provides counseling and referral services for mentally retarded persons seeking group homes, and (2) it has had to devote significant resources to combatting the City Council's discrimination. *Id.* However, it has not yet proven any drain on its resources, so it does not come within the *Havens* formula.

In future cases, the JCARC can put forth evidence proving such an injury, or it can show that one of its members actually desires to live in the contested group home.[16]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

---

[16]Admittedly, we have provided the JCARC with a formula for establishing standing in its future litigation. There is high precedent for giving such advice. See *Sierra Club v. Morton, supra,* 92 S.Ct. at 1366.

CLEBURNE LIVING CENTER, INC., et al., Plaintiffs-Appellants,

v.

CITY OF CLEBURNE, TEXAS, et al., Defendants-Appellees.

No. 82-1565.

United States Court of Appeals, Fifth Circuit.

July 6, 1984.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1984, 5 Cir., 1984, 726 F.2d 191)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge, with whom BROWN, GEE, REAVLEY, JOLLY and DAVIS, Circuit Judges, join, dissenting.

I respectfully dissent from the denial of a rehearing en banc.

The panel has made a holding no other federal appellate court has: that state regulations treating the mentally retarded differently than others are on that account facially invalid if they fail to meet the "intermediate" or "heightened" scrutiny test applicable to classifications such as those based on gender or legitimacy, notwithstanding that the regulatory distinctions in question are rationally based and impair no fundamental rights.[1] I believe this holding not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration.

It is both a cliche and a fundamental truth that equality does not demand treating materially different conditions in the same manner. Hence, where fundamental rights are not concerned, a threshold requirement for scrutiny beyond the rational basis level should be that the group singled out for special treatment be not generally, or with respect to the field of regulatory subject matter under consideration, significantly different, as a result of its defining characteristics, from the rest of society in terms of its needs and abilities to function. Where difference in treatment should rationally be expected, it is indeed an ill-advised rule that treats its presence as quasi-suspect.

Classification based on mental retardation is generically different from that based on gender or legitimacy, the prototypical "quasi-suspect" classifications. Under the broadly held and judicially accepted view, women and illegitimates are not generally different from the rest of society in terms of their needs and abilities to function. Women have as much need for, and ability to benefit from, the same kinds

---

[1]The district court held the regulatory distinctions here at issue to be rationally based. The panel did not reach that question, and hence neither does this dissent, which is directed only to the rule announced by the panel. The panel likewise held there was no impairment of fundamental rights.

of education as men,[2] and illegitimate children have as much need for, and can equally benefit from, parental support as legitimate children. Thus, for example, governmental distinctions between the sexes respecting education, or between legitimate and illegitimate children respecting the obligation of parental support, are quasi-suspect. The mentally retarded present a wholly distinct situation.[3] They *are* materially different from the rest of society, and are so as a result of their class-defining characteristics.

The characteristics which define the retarded as a class — the presence from birth or early childhood of an incurable, though ameliorable, significant deficit in intellectual development and social adaptation — bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions, and are highly relevant to proper legislative goals in most respects.

And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill. This, of course, was recognized by plaintiffs' expert in the present case in his testimony quoted in the panel opinion (note 12) that mental retardation and mental illness are "conditions requiring entirely different approaches." It is likewise obvious that entirely different approaches are also required in respect to the retarded and the very young, or the very old, or the physically ill.

---

[2]The same may be said with respect to legal and illegal alien children.

[3]As observed in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973):

> ". . . what differentiates sex from such *nonsuspect statuses* as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.*" (Emphasis added.)

Clearly that, too, is recognized by the plaintiffs here, who seek to create an environment *restricted* to and specifically designed for the retarded. Plaintiffs here do not want a children's day-care facility or a hospital. The retarded, *as such*, are not hospitalized or placed in nursing homes. In short, the retarded, often with minds at or below third-grader level in the bodies of otherwise relatively healthy adults, present a *special* set of needs, requirements, and problems unique to their condition.

As "entirely different approaches" are required respecting the retarded, are we nevertheless to treat the presence of difference in approach as "quasi-suspect"? It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether or not the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened" scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"?[4] Are we to review as "quasi-suspect" the failure of governmental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared?

---

[4]In Justice Brandeis' famous words: "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). The panel opinion appears to regard the integrative model as the preferred method of aiding the retarded. *See* At 199 ("Isolated from normal community patterns, they can never hope to adapt."). Are other models constitutionally "quasi-suspect"?

Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the nonretarded, but where judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded.

The factors relied on by the panel for its determination that the retarded are a quasi-suspect class[5] should not alone suffice for such purpose, absent the class' meeting a threshold level of lack of significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either generally or in respect to the regulatory area under consideration. The panel factors in no way mitigate the contradictory nature of "quasi-suspecting," as being unequal, the different treatment of conditions that are significantly different. Indeed, the panel factors tend to increase in strength with the degree of retardation and the concomitant increased appropriateness of disparate treatment.[6] Where

---

[5]The factors cited by the panel (At 197-98) may be summarized as follows: (1) "likely to reflect deep-seated prejudice"; (2) "history of unfair and often grotesque mistreatment," including "universally denied admittance into public schools" (until 1970's), segregation "in remote, stimatizing institutions," and "often been subjected to ridicule"; (3) "have lacked political power"; (4) "their condition [though ameliorable] is immutable."

[6]I believe it fair to assume that, to the extent the public tends to react toward the retarded differently than toward the nonretarded, the differences in reaction are greatest with respect to those whose retardation is more pronounced, and least with respect to the marginally retarded (those with, say, an IQ at or only slightly below 70). Certainly, the marginally retarded are far more likely to attend public schools, and far less likely to be "in remote, stigmatizing institutions," than those with more pronounced retardation. In terms of their ability to be trained so as to increase their social adaptive behavior to approach minimal levels necessary to unction in society, the condition of the marginally retarded is certainly less "immutable" than that of those whose retardation is more pronounced. With respect to political power, the marginally retarded are more likely to vote (*see* panel opinion, note 10).

the need for greater differences in treatment is most evident — the severely and profoundly retarded — the classification is the most suspect.

State regulations will inevitably often distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view a major and unwarranted extension of federal judicial power, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. Before we thus expand our own powers I believe the states, and those charged with the legislative and executive functions, should at least be afforded a review en banc.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom JOHN R. BROWN, Circuit Judge, joins, specially concurring in the dissent:

I join the dissent from the denial of en banc rehearing. I share the concerns so well expressed by Judge Garwood's dissent, but it is not necessary to reach a final judgment without the benefit of oral argument and collegial effort and I stop short of doing so. Only the case for en banc consideration need now be made and the dissent has done that. We have recently been willing to convene en banc solemnly to deliberate diversity cases whose vitality wholly depends on the next state court decision. *Sturgeon v. Strachan Shipping Co.*, 731 F.2d 255, 260 (5th Cir.1984) (en banc) (Rubin, J., dissenting); *Edwards Co. v. Monogram Industries, Inc.*, 730 F.2d 977, 987 (5th Cir.1984) (en banc) (Rubin, J., concurring). I am puzzled, then, that a case which implicates government's relationship with a uniquely insular minority and reexamines the relative roles of federal and state governments and their branches in their superintendence would not be deemed by a majority of this court worthy of en banc consideration.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1565

D. C. Docket No. CA3-80-1576 F

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs-Appellants,

versus

CITY OF CLEBURNE, TEXAS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

MARCH 5, 1984
ISSUED AS MANDATE: JULY 16, 1984

F-1

U.S. District Court
Northern District of Texas
F I L E D
Aug. 27, 1984
Gilbert F. Ganucheau,
Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1565

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs-Appellants,

versus

CITY OF CLEBURNE, TEXAS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ORDER:

☐ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 27, 1984 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the

Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of ..... for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

☐ The motion of ..... for a further stay of the issuance of the mandate is DENIED.

CHARLES CLARK

CHIEF JUDGE

MDT-4

Office Supreme Court, U.S.
FILED
OCT 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

RENEA HICKS
Counsel of Record
DIANE SHISK
ADVOCACY, INC.
1006 East 50th Street
Austin, Texas 78751
(512) 475-5543
Attorneys for Respondents

October 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

STATEMENT OF QUESTION PRESENTED

Whether intermediate scrutiny under the Equal Protection Clause is appropriate to invalidate the City of Cleburne's actions preventing the establishment of the city's first group home for mentally retarded persons on the invidiously discriminatory ground that its residents would be mentally retarded persons, who suffer from historical prejudice, isolation, and stigmatization, are politically powerless, and possess an essentially immutable characteristic?*

---

* Pursuant to Rule 28.1 of the Rules of the Court, it hereby is noted that two of the three corporate respondents—Cleburne Living Center, Inc., which since February, 1982, has been known as Community Living Concepts, Inc., and Advocacy, Inc.—have no parent companies, subsidiaries, or affiliates. The third corporate respondent—Johnson County Association for Retarded Citizens—is a local affiliate of the "Association for Retarded Citizens/United States—National Headquarters."

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT:	
I. The Decision of the Court of Appeals Is Not in Conflict With the Decision of Any Federal Circuit Court of Appeals	4
II. The Decision of the Court of Appeals Does Not Warrant Review by This Court as a Matter of Significant Public Importance	6
III. The Decision of the Court of Appeals Is Correct	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Abrams v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982) 5
Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982) 5
Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) 4
California Association of the Physically Handicapped, Inc. v. Federal Communications Commission, 721 F.2d 667 (9th Cir. 1983) 4
City of New Orleans v. Dukes, 427 U.S. 297 (1976) 8
Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984) ..... *passim*
Consolidated Rail Corp. v. Darrone, —— U.S. ——, 104 S. Ct. 1248 (1984) 5
In re Griffiths, 413 U.S. 717 (1973) 8
J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983) 5
Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 7
Plyler v. Doe, 457 U.S. 202 (1982) 9
Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980) 5
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 8

Constitutions, statutes, ordinances, and rules:

U.S. Const. amend. XIV, § 1 2
42 U.S.C. §§ 6001-6081 7
Rule 28.1, Rules of the Supreme Court of the United States i
Tex.Rev.Civ.Stat.Ann. art. 5547-300 (Vernon Supp. 1984) 7
Cleburne, Tex., Zoning Ordinance (1965) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-468

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Cleburne Living Center, Inc. (hereinafter "CLC"), Jan Hannah, Advocacy, Inc., and Johnson County Association for Retarded Citizens, respectfully request that the Court deny the petition for writ of certiorari filed by the City of Cleburne, Texas, and several of its officials (hereinafter "the City"), seeking review of the Fifth Circuit's judgment in this case. The opinion upon which that judgment is based is reported at 726 F.2d 191, and the denial of the City's motion for rehearing and rehearing en banc is reported at 735 F.2d 832.

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

Cleburne, Tex., Zoning Ordinance, § 8 (June 8, 1965):

> In District R-3, . . . the following uses [are permitted]:
>
> 1. Any use permitted in District R-2.
> 2. Apartment houses, or multiple dwellings.
> 3. Boarding and lodging houses.
> 4. Fraternity or sorority houses and dormitories.
> 5. Apartment hotels.
> 6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.
> 7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
> 8. Philanthropic or eleemosynary institutions, other than penal institutions.
> 9. Accessory uses customarily incident . . . to any of the above uses . . .
>
> . . . .

Cleburne, Tex., Zoning Ordinance, § 16 (June 8, 1965):

> Any of the following uses may be in any district by Special Use Permit. . .
>
> . . . .
>
> 9. Hospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions.
>
> . . . .

U.S. Const. amend. XIV, § 1:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

When CLC and other respondents attempted to establish the first group home for mentally retarded people in the City, the City's officials interpreted its zoning ordi-

nance to require a special use permit for the group home because of the mental retardation of its residents. The special permit requirement was imposed despite the fact that such equally intensive uses as hospitals, public schools, nursing homes, and homes for delinquent children are permitted at the same location without a special use permit.[1] The City, in response to what the Fifth Circuit accurately characterized as the "prejudices and fears of neighbors," 726 F.2d at 201, then denied the special use permit because the residents would be mentally retarded. *See* Trial F.F. #29, at A-8 to 9.

Such intentional discrimination rarely occurs in such pure form; yet, in the City's case, it happened not only through the ordinance's facially discriminatory special use permit requirement, but also through the ordinance's application in the discriminatory denial of the special use permit when it was sought. By these intentional actions, the City deprived thirteen mentally retarded people of the opportunity to live in a group home in the City, even though essentially any other group of thirteen people could have lived freely at the same location without having to seek the City's permission at all.

This is a zoning case about whether a city may exclude mentally retarded persons from a community for no other reason than that they are mentally retarded and some of the neighbors do not want them around. The Fifth Circuit held that a city cannot use its zoning laws to accomplish such an intentionally exclusionary objective. The City

---

[1] At p. 4 of its Petition, the City misstates the facts on this point and claims for the first time that the residents' mental reardation was irrelevant to its treatment of the group home as an unpermitted use. The trial court found otherwise. *See* Trial Court Finding of Fact #24, at A-7 of City's Petition [hereinafter cited as "Trial F.F. #—, at A-—"]. ("If the potential residents . . . were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance."); *see also* 726 F.2d at 200. ("The same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded.")

now is asking this Court to hear the case and hold that the Fifth Circuit was wrong.

ARGUMENT

I. The Fifth Circuit's Decision Is Not in Conflict With the Decision of Any Federal Circuit Court of Appeals.

The City has cited two circuit court decisions, *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983), and *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), and claimed that the Fifth Circuit decision is in "direct conflict" with them. *See* City's Petition, at p. 5. The City's statement is wrong. There is no conflict. The Fifth Circuit accurately characterized the issue upon which it chose to rest its decision as "one of first impression." *See* 726 F.2d at 196.[2]

Neither *Brown v. Sibley* nor *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission* even discussed the question of whether classifications based on mental retardation require an intermediate or higher level of scrutiny. *Brown* rejected the argument that the physically handicapped were a suspect class. 605 F.2d at 765-66. *California Association of the Physically Handicapped* rejected the same argument. 721 F.2d at 670. Moreover, the California case is one in which affirmative action was sought, whereas the mere removal of a discriminatory impediment is sought in this case. There is no conflict whatever between the legal

---

[2] Judge Politz, who joined Chief Judge Clark and Judge Goldberg on the panel in this case, also sat on the *Brown v. Sibley* panel, yet he noted no conflict. None of the fifteen judges of the Fifth Circuit cited *Brown v. Sibley* even once in discussions of the equal protection issue in this case. Clearly, the City is seeing a conflict not seen by a single member of the court in which the conflict is purported to exist.

principle those two circuit cases established, and the one on which the Fifth Circuit rested its decision in this case.[3]

The range of handicaps is wide, stretching from physical handicaps arising from injuries suffered as an adult, *see e.g., Consolidated Rail Corp. v. Darrone*, —— U.S. ——, 104 S. Ct. 1248 (1984) (involving railway worker whose handicap was due to amputated hand and forearm), to disabilities that arise at birth and are essentially immutable. *Cf. Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 202 (1982) ("wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied"). Mental retardation is a unique handicap, and no federal circuit has disagreed with the Fifth Circuit's treatment of it in this case.

The absence of a conflict among the circuits indicates that it is premature for the Court to consider whether heightened scrutiny is appropriate in zoning or other types of cases involving classifications based on mental retardation. This case was a narrow—and comparatively easy—one for the Fifth Circuit. It is not, as the City tries to characterize it, a decision broadly destructive of legislative prerogatives in all areas touching upon mental retardation, as well as all other types of handicaps.

---

[3] Dicta in cases decided by the only two other circuits to even mention the issue in passing suggests a harmony among the circuits. *See Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (discrimination against mentally retarded persons is invidious); *Romeo v. Youngberg*, 644 F.2d 147, 163 n.35 (3d Cir. 1980 (mentally retarded persons may be a "discrete and insular minority"). Further harmony is suggested by the recent decision of *J. W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983), which applied heightened scrutiny to invalidate zoning actions excluding a group home for mentally ill people. Of course, as the trial record here reveals and the Fifth Circuit explained, *see* 726 F.2d at 192 n.2 & at 198-99 n.11, mental retardation is not a mental illness. It is essentialy a learning problem, not an emotional disorder.

II. The Decision of the Court of Appeals Does Not Warrant Review by This Court as a Matter of Significant Public Importance.

In its effort to convince the Court of the case's importance, the City has vastly overstated the reach of the Fifth Circuit's decision. The decision is a relatively narrow one and does not call into question virtually all public executive and legislative decisions concerning mentally retarded people.

The facts in this case present a situation of intentional, invidious discrimination against mentally retarded people, with the City simply excluding them from the enjoyment of a basic benefit available to nearly everyone else—the right to live in a community. It is not a case, as the City has tried to characterize it, in which the judicial branch intrudes into delicate legislative or executive adjustments in the allocation of public resources. The Fifth Circuit's decision establishes no principle which directs how such adjustments must be balanced between the needs of mentally retarded people and the needs of others. It requires no increase in or reallocation of public funds. It says nothing about public actions which unintentionally affect mentally retarded people. Such public actions are not called into question by the Fifth Circuit.

The Fifth Circuit's decision will not lead to an inundation of the federal courts by mentally retarded claimants. Rarely will there be such a clear case of intentional, invidious discrimination by public officials against mentally retarded people. It will be even rarer that zoning cases such as this one will arise in the federal courts. Zoning cases, even those involving disputes about group homes for mentally retarded people, nearly always arise in state courts and present state law issues. In the future, this circumstance will occur even more often. Increasingly, as the City itself recognizes, *see* City's Petition, at p. 12, state legislatures are taking the initiative to pass state zoning laws to insure that community-based

living alternatives for mentally retarded people are made available.[4] As these state laws are implemented, fewer and fewer communities will be able under state law to engage in the blatantly exclusionary actions in which the City here engaged. Those that do, if they are called to task, will be called to task in state courts to explain their failure to abide by state law standards, as most such cities now are.

This case, which still must be litigated in the trial court on the issue of damages, simply will not present for this Court's resolution the significant issues attributed to it by the City. It is true that the case is very important to the parties involved in it, but that, of course, is not the test of significance that the Court applies. Whether zoning ordinances such as the City's which provide no guidelines whatsoever regarding issuance of a permit, which include nearly incomprehensible use classifications, and which refer to mentally retarded persons as "feebleminded" are constitutional is a question the federal courts are unlikely to see very often.

III. The Decision of the Court of Appeals Is Correct.

Given the facts of this case and the ordinance at issue, the Fifth Circuit reached the correct result of invalidating the City's ordinance on its face and as applied in the special use permit denial. The question before the Fifth

---

[4] These state legislative initiatives, which will make zoning ordinances as antiquated as the City's increasingly rare, are, in part at least, responsive to policies such as those embodied in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081, which "establishes a national policy to provide better care and treatment" to developmentally disabled citizens. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 15 (1981). One aspect of the policy is that developmentally disabled citizens should receive habilitation in a setting least restrictive of their personal liberty. 42 U.S.C. § 6010(2). *See also* § 7, Texas Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann. art. 5547-300 (Vernon Supp. 1984).

Circuit was not whether mentally retarded people are entitled to a special, particular treatment somehow setting them above or apart from other citizens. The question, instead, was whether they are to be treated as though they are entitled to less than other citizens. The Fifth Circuit held that they were entitled at least to equal treatment under the laws, including the City's zoning ordinance. The court's conclusion was correct.

In seeking to overturn the Fifth Circuit's decision, the City now is asking this Court to place its imprimatur on the City's exclusionary actions which, as the trial court found, were based on the mental retardation of the group home's residents. *See* Trial F.F. #24, at A-7, and F.F. #29, at A-8 to 9. In effect, as the Fifth Circuit stated, the City wants the Court to allow "prejudice [to] become[] its own excuse," 726 F.2d at 202. This Court already has found such a principle constitutionally impermissible, *see In re Griffiths*, 413 U.S. 717, 722 n.8 (1973), and the Fifth Circuit properly rejected the City's argument.

The Fifth Circuit also acted correctly in recognizing that mentally retarded people suffering from invidious, intentional discrimination should receive more constitutional protection than, for example, that received by people such as the displaced hot dog vendors in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). While recognizing that mentally retarded people have special needs that in some contexts call for non-invidious distinctions to be made, 726 F.2d at 198, the Fifth Circuit appropriately looked to this Court s discussions of suspectness for guidance in arriving at the proper level of judicial scrutiny to apply to the City's actions in this case. *See* 726 F.2d at 196-200.

In evaluating the indicia of suspectness previously elucidated in cases such as *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (indicat-

ing that a class is suspect if it is saddled with disabilities, has been subjected to a history of purposeful unequal treatment, or has been relegated to a position of political powerlessness), the Fifth Circuit looked to two especially pertinent facts determined by the trial court. In one, the trial court found that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. . . ." Trial F.F. #30, at A-8. In the other, it found that "[p]ersons who are mentally retarded historically have been subject to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements." Trial F.F. #32, at A-8.

Then, the Fifth Circuit looked to *Plyler v. Doe*, 457 U.S. 202 (1982), and determined that the intermediate tier of scrutiny was appropriate. Its determination was correct. The circumstances of this case, as the Fifth Circuit found, are analogous to those in *Plyler v. Doe*, *supra*, where persons not responsible for their status (there, children of illegal aliens; here, mentally retarded persons) were seeking basic societal benefits (there, education; here, a place to live). In such circumstances, the intermediate tier of scrutiny was properly applied and the statutory scheme was invalidated. The Fifth Circuit's decision was consistent with, and not contrary to, principles already established by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RENEA HICKS
Counsel of Record
DIANE SHISK
ADVOCACY, INC.
1006 East 50th Street
Austin, Texas 78751
(512) 475-5543
Attorneys for Respondents

October 1984

Office-Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-468

In The Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,

Petitioners,

v.

CLEBURNE LIVING CENTER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

LAW OFFICES OF EARL LUNA, P.C.

EARL LUNA
ROBERT T. MILLER, JR.
MARY MILFORD
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Reply Brief for Petitioners	1
I. The Decision of the Fifth Circuit in this Case is in Direct Conflict with the Decision of this Court in *Macon Association For Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*	1
II. The Impact of the Fifth Circuit Decision in this Case is of National Importance	2
III. The City Did Not Discriminate Against the Mentally Retarded	5
Conclusion	7
Proof of Service	8

TABLE OF AUTHORITIES

	Page
CASES	
Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981)	4
California Association of the Physically Handicapped v. Federal Communications Commission, 721 F.2d 667 (9th Cir. 1983)	4
Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas, et al., No. CA3-80-1576-F (N.D. Tex. October 4, 1982)	6
Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas, et al., 726 F.2d 191 (5th Cir. 1984)	4
Cleburne Living Center, Inc., et al., v. City of Cleburne, Texas, et al., 735 F.2d 832 (5th Cir. 1984)	4
Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, (1975)	2
Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission, 314 S.E.2d 218 (Ga. 1984), appeal dismissed, 53 U.S.L.W. 3205 (October 1, 1984)	1, 2, 3, 4
OTHER AUTHORITY	
53 U.S.L.W. 3191 (September 25, 1984)	2

No. 84-468

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,

Petitioners,

v.

CLEBURNE LIVING CENTER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

I. THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *MACON ASSOCIATION FOR RETARDED CITIZENS V. MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION*

On October 1, 1984, after the filing of Petitioners' Application for a Writ of Certiorari on September 22, 1984, this Court dismissed the appeal for want of a substantial federal question in *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 314

S.E.2d 218 (Ga. 1984), appeal dismissed, 53 U.S.L.W. 3205 (October 1, 1984). One of the questions presented to this Court on appeal was:

> Did Georgia Supreme Court err in applying rational basis test for examining equal protection claim generated by denial of housing permit to home for mentally retarded in that stricter standard of scrutiny should have been applied?

53 U.S.L.W. 3191 (September 25, 1984). The Fifth Circuit's decision in the instant case is in direct conflict with this Court's decision in the *Macon Association* case regarding the level of scrutiny for Equal Protection analysis to be applied to a zoning ordinance which affects mentally retarded persons. This Court's dismissal of the appeal for want of a substantial federal question constitutes a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289 (1975).

The *Macon Association* case is almost a direct parallel to the case at bar. It involved a zoning resolution (ordinance) that established "permitted" uses and "conditional" uses of the land in each zoning district. The "conditional" use is akin to the special use permit in the present case, which permits the use in certain circumstances after a hearing on the proposed use. The Macon-Bibb County zoning resolution (ordinance) provided for a "conditional" use permit for homes for the mentally retarded in certain zoning districts, but not in the single-family residential zoning districts. The Macon Association for Retarded Citizens applied for an amendment to the zoning resolution (ordinance) in order to permit the construction of two group homes for mentally retarded persons in the single-family residential zones. Petitioners before the Supreme Court of Georgia asserted

that application of the rational-relation test for Equal Protection analysis of the ordinance was improper since they asserted that mentally retarded persons constitute at least a "quasi-suspect" class thereby being entitled to a middle-tier level of review. *Macon Association, supra,* at 220. The Supreme Court of Georgia affirmed the decision of the Georgia Superior Court in its application of the rational-relation test to the resolution (ordinance), even though "[i]t is true that the Resolution does contain separate classification for mentally ill or retarded individuals." *Macon Association, supra,* at 221. An appeal was taken in *Macon Association,* and this Court dismissed the appeal from the Georgia Supreme Court decision for want of a substantial federal question, thereby creating a direct conflict with the Fifth Circuit decision in the present case holding that the mentally retarded are a "quasi-suspect" class entitled to mid-level scrutiny of a zoning ordinance.

II. THE IMPACT OF THE FIFTH CIRCUIT DECISION IN THIS CASE IS OF NATONAL IMPORTANCE.

Respondents' brief in opposition states that the decision of the Fifth Circuit "is a relatively narrow one" and attempts to limit the scope of this case to a particular alleged act of discrimination and to the parties involved. (Br. in Opp. p. 6-7). On the contrary, the Fifth Circuit's decision has far-reaching precedent for all governmental entities whose legislation[1] may even remotely impact the mentally retarded. The Fifth Circuit's characterization of the mentally retarded as "quasi-suspect" calls into question all legislation regarding the mentally retarded and opens the door for a plethora of

---

[1]The term "legislation" is used in this Reply as being inclusive of agency regulatory action or other governmental promulgations as well as legislation.

challenges to state, municipal, school and federal law. The Fifth Circuit's decision is not restricted to a particular municipality or a particular group of retarded persons. Rather, the Fifth Circuit laid the foundation for a holding of national significance when the Court became the first Circuit Court of Appeals to determine "mentally retarded persons are . . . a 'quasi-suspect' class and that laws discriminating against the mentally retarded should be given intermediate scrutiny." *Cleburne Living Center, Inc., et al. v. City of Cleburne, Texas, et al.*, 726 F.2d 191, 198 (5th Cir. 1984); Appendix C-16. There is no language in the Fifth Circuit Panel's opinion which seeks to limit the holding to a particular municipality or a particular group of mentally retarded individuals.

If the Fifth Circuit's decision recognizing a heightened level of judicial scrutiny is allowed to stand, zoning or any legislation which affects the mentally retarded will be subject to an Equal Protection challenge. Such heightened review may prove equally detrimental as beneficial to the mentally retarded since it will also be applied to legislation intended to benefit them but requiring a discriminatory approach for that benefit. See *Cleburne Living Center, Inc., et al. v. City of Cleburne, Texas et al.*, 735 F.2d 832,, 833-834 (5th Cir. 1984); Appendix D-4, D-5.

The conflicting decisions on this issue between the Fifth Circuit decision, this Court's decision in *Macon Association, supra*, and the circuit decisions in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983), and in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), will require litigation on this matter until this Court does resolve the level of review to be accorded legislation affecting the mentally retarded.

III. THE CITY DID NOT DISCRIMINATE AGAINST THE MENTALLY RETARDED

This case is not, as Respondents state at p. 3 of their Brief in Opposition, "a zoning case about whether a city may exclude mentally retarded persons from a community." The ordinance does not even address itself to mentally retarded persons who live within the city. The ordinance addresses itself to the business of providing a group home for mentally retarded persons. Furthermore, the home may be located anywhere in the city by means of a special use permit. This *is* a zoning case regarding whether or not an intended use at a particular location was an appropriate use for that location, and the City Council determined, for a number of reasons, that it was not.

The Respondents are also incorrect in their assertion that the City "misstates the facts and claims for the first time that the residents' mental retardation was irrelevant to its treatment of the group home as an unpermitted use." (Br. in Opp. p. 3). On the contrary, the Petitioners have stated at trial, in their Petition for Rehearing to the Fifth Circuit, as well as in their Petition for a Writ of Certiorari at p.4 that

> "[o]ne of the prime reasons for the denial of the special use permit was that the structure was not appropriate for its intended use of housing fifteen people — nor would it be appropriate as a boarding house for that many people.

Furthermore, the District Court determined in its Finding of Fact 34 that "the size of the home and the number of people to be housed" was a factor in the decision of the members of the City Council of Cleburne to deny the Respondents a special use permit for the house at 201

Featherston St. See District Court Opinion Finding of Fact 34 at pp. 9-10. Appendix A-8.

The District Court's Finding of Fact 34 was based on the testimony that one of the reasons City Councilman Alfred Johns voted to deny the special use permit was because he did not think the property was large enough for the requested facility at 201 Featherson St. (R. Vol. 1, p. 30), and because he did not think the property was large enough to afford recreation for at least thirteen mentally retarded persons, (R. Vol. 1, p. 34). City Councilman Arval Martin also stated that the location of a facility for the mentally retarded was inappropriate because the yard was too small. (R. Vol. 1, p. 42). City Councilman J. T. Bass also testified that the property was not adequate for the use it was intended. (R. Vol. 1, p. 17).

As the Petitioners have stated throughout the course of these proceedings, the City of Cleburne ordinance only establishes a permitted land use at a specific location; it does not confer appropriateness for that use on whatever structure may exist at that location. The structure at 201 Featherston St. is nothing more than a 2510 square foot frame house with four bedrooms and two baths and as such it could not function as a boarding house for fifteen unrelated adult men and women. The ordinance does not confer on this structure the required characteristics of a boarding house or a hospital, which is also a permitted use for this location. The inherent requirements of the intended use of a structure, not the zoning permission, are the determinant factors in establishing the appropriateness of the structure in question. In some instances, the City determines that a structure is appropriate for its intended use by means of its building code and occupancy permits, and in certain other instances, such as nurseries and residential care facilities for the

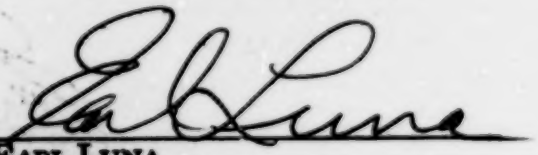
mentally retarded, the special use permit is the City's mechanism to determine the appropriateness of the intended use of a structure such as the house at 201 Featherson St. The denial of the special use permit did not establish that a residential facility for mentally retarded persons could not exist on the land located at 201 Featherston St. at all; rather, it established that the use of the particular structure located there was not appropriate for the intended use of housing fifteen unrelated adult men and women. It has nothing to do with discrimination.

CONCLUSION

For the foregoing reasons as well as those stated in their Petition for a Writ of Certiorari, Petitioners pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: 

EARL LUNA
ROBERT T. MILLER, JR.
MARY MILFORD
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Attorneys for Petitioners

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners herein in all proceedings in which they have been involved in the Courts below.

I further state upon oath that on the 30 day of November, 1984, I served copies of the foregoing Reply Brief for Petitioners by depositing the same in the United States mail, with first-class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Renea Hicks and Ms. Diane Shisk, Advocacy, Inc., 1006 East 50th Street, Austin, Texas 78751.

Earl Luna

Earl Luna

SUBSCRIBED AND SWORN To before me by the said Earl Luna, on this the 30 day of November, 1984.

Betty Jarratt
Notary Public, State of Texas
My commission expires 11/30/84

Office - Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVAS
CLERK

No. 84-468

In the Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

EARL LUNA, Counsel of Record
ROBERT T. MILLER, JR.
MARY MILFORD
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Counsel for Petitioners

December 26, 1984

54pp

QUESTIONS PRESENTED

1. Whether mentally retarded persons are a "quasi-suspect" class for purposes of Equal Protection analysis.

2. Whether for Equal Protection analysis, all legislation affecting mentally retarded persons must be tested by an "intermediate" or "heightened" level of scrutiny.

LISTING OF PARTIES

PETITIONERS:

City of Cleburne, Texas
George W. Marti, Mayor of the City of Cleburne
J. T. Bass, Member of the Cleburne City Council
Arval Martin, Jr., Member of the Cleburne City Council
Lonnie Watson, Former Member of the Cleburne City Council, who resigned August 30, 1984
(Replaced Alfred Johns, deceased)
Rita Papajohn, Cleburne City Attorney
(Replaced Susan McMillion, who replaced Robert T. Miller, Jr., who replaced Jim Ferguson)

ATTORNEYS FOR PETITIONERS:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert T. Miller, Jr.
Mary Milford

RESPONDENTS:

Cleburne Living Center, Inc.
(Now known as Community Living Concepts, Inc.)
Jan Hannah
Advocacy, Inc.

ATTORNEYS FOR RESPONDENTS:

Advocacy, Inc.
Renea Hicks
Diane Shisk

TABLE OF CONTENTS

	Page
Questions Presented	i
Listing of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision and Ordinance Involved	2
Statement of the Case	4
Summary of the Argument	8
Argument	10
I. The Mentally Retarded Do Not Possess Sufficient Indicia of "Suspectness" to be a "Quasi-Suspect" Class	10
The Mentally Retarded Are Not a "Discrete Insular Minority"	12
The Characteristics of the Mentally Retarded Although Immutable Are Relevant to Legislative Classification	16
Attitudes Have Changed Toward the Mentally Retarded	19
The Mentally Retarded Are Not a Politically Powerless Group	21
II. The Rational Basis Level of Review Should Be Applied to Legislation Affecting the Mentally Retarded	23
III. The Fifth Circuit Decision is Contrary to the Decisions of This Court and Other Circuit Courts of Appeal	37
Conclusion	43
Certificate of Service	44

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Banks, 520 F.Supp. 472 (S.D. Ga. 1981) 39

Association for Retarded Citizens of North Dakota v. Olson, 561 F.Supp. 473 (D.N.D. 1982), aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983) 39, 40

Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) 31, 32

Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966, 102 S.Ct. 3469 (1982) 36

Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981) 37, 38, 39

California Association of the Physically Handicapped, Inc. v. Federal Communications Commission, 721 F.2d 667 (9th Cir. 1983) 37, 38

Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451 (1976) 11, 12

Developmental Disabilities Advocacy Center, Inc. v. Melton, 521 F.Supp. 365 (D.N.H. 1981) 39

Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) 18, 20

Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1067 (1978) 23

Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980) 19, 38

Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973) 9, 12, 18, 39, 40

Garcia v. Siffrin Residential Association, 407 N.E.2d 1369 (1980), cert. denied, 450 U.S. 911, 101 S.Ct. 1349 (1981) 24

Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671 (1980) 22

Hicks v. Miranda, 411 U.S. 332, 95 S.Ct. 2281 (1975) 41

J. W. v. City of Tacoma, Washington, 720 F.2d 1126 (9th Cir. 1983) 28

TABLE OF AUTHORITIES — (Continued)

	Page
Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017 (1971)	12
Lombardo v. City of Dallas, 73 S.W.2d 475 (Tex.1934)	23
Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission, 314 S.E.2d 218 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984)	9, 11, 41, 42
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562 (1976)	9, 18, 19, 20
Matthews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755 (1976)	12
New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973)	39
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981)	10, 22
Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982)	10, 23
San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973)	11, 12, 15
Tigner v. State of Texas, 310 U.S. 141, 60 S.Ct. 879 (1940)	23
Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977)	36
United States v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778 (1938)	12, 15
Upshur v. Love, 474 F.Supp. 332 (N.D. Cal. 1979)	19
Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974)	24
Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926)	23, 24
Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975)	36
Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452 (1982)	9, 34, 35, 38, 40

TABLE OF AUTHORITIES — (Continued)

Page

CONSTITUTION

U.S. Const. Amendment XIV, Sec. 1 ..... passim

STATUTES

20 U.S.C. § 1401, *et seq.* 21, 31, 40
28 U.S.C. § 1254(1) 2
29 U.S.C. § 706 38
29 U.S.C. § 794 ..... 5, 21, 32, 37, 38
31 U.S.C. § 1221, *et seq.* 5
31 U.S.C. § 6701, *et seq.* 5
42 U.S.C. § 1396d(d) 21, 32
42 U.S.C. § 1397 ..... 21, 32
42 U.S.C. § 6000, *et seq.* 21, 32
42 U.S.C. § 6010 22
42 U.S.C. § 6012 ..... 5, 22
Tex. Vernon's Ann. Civ. St. art. 1011a 23
Tex. Vernon's Ann. Civ. St. art. 1011b 23
Tex. Vernon's Ann. Civ. St. art. 5547-300 ..... 5, 21

ORDINANCE

City of Cleburne, Texas Zoning Ordinance (Pl. Ex. 1) ..... passim

REGULATIONS

Tex. Department of Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 58 (January 8, 1982). (Def. Ex. 10) 6, 31

OTHER AUTHORITIES

Department of Transportation and Related Agencies Appropriation Acts, 1975-1984 ..... 21, 32

TABLE OF AUTHORITIES — (Continued)

	Page
Ely, John H., *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge, Massachusetts: Harvard University Press, 1980)	16
Johnson, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?*, 7 Ohio No. L. Rev. 64 (1980)	22
Joint Commission on Accreditation of Hospitals, Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons, *Manual for Training of Surveyors in Assessing Active Treatment as Required by the Federal Regulations for Intermediate Care Facilities for Mentally Retarded Persons (45 CFR 249.13)*, revised November 15, 1977. (Pl. Ex. 27)	13, 14, 15
Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. Rev. L. & Soc. Change 137 (1975)	22
Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Columbia L. Rev. 1023 (1979)	16
Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model, 90 Yale L. J. 912 (1981)	16
Reiner, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W.Va. L. Rev. 669 (1980)	22
Roberto, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"*, 28 Wayne L. Rev. 1349 (1982)	22
Texas Department of Health, *Minimum Licensing Standards for Facilities Serving the Mentally Retarded Citizens of Texas*, effective November 10, 1981. (Pl. Ex. 25)	31
53 U.S.L.W. 3191 (September 25, 1984)	41
Webster's Third New International Dictionary of the English Language Unabridged, 1981 Edition	12, 13

No. 84-468

In the Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The United States District Court for the Northern District of Texas, Dallas Division, filed its unpublished Memorandum Opinion — Findings of Fact and Conclusions of Law on October 4, 1982, which is reprinted at Joint Appendix (J.A.) 88. The Judgment, also filed on October 4, 1982, is reprinted at J.A. 111.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed March 5, 1984, reported at 726 F.2d 191, is reprinted at J.A. 112.

The opinion of the United States Court of Appeals for the Fifth Circuit, filed July 6, 1984, consisting of the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc and the seven judge dissent thereto with opinions by Justices Garwood and Higginbotham, reported at 735 F.2d 832, is reprinted at J.A. 138. The mandate was issued on July 16, 1984, reprinted at J.A. 145, and on August 27, 1984, the Fifth Circuit entered its Order granting a recall and stay of the mandate until September 27, 1984, which Order is reprinted at J.A. 146.

This Court entered its Order granting the petition for a writ of certiorari on November 13, 1984.

JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on March 5, 1984. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc were denied on July 6, 1984.

On September 22, 1984, Petitioners filed a timely Petition for Writ of Certiorari, and on November 13, 1984, this Court granted the Petition for a Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

U.S. Constitution, Amendment XIV, Sec. 1

[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Comprehensive Zoning Ordinance of the City of Cleburne, Texas

Section 3. Districts.

For the purpose of regulating and restricting the use of land and the erection, construction, reconstruction, alteration, moving or use of buildings, structures or land, all land within the corporate limits of Cleburne are hereby divided into fourteen (14) districts with their respective rank from more to less restrictive classification as follows . . .

. . . .

Section 8. District R-3. Apartment house district.

USE REGULATIONS

In District R-3, no building, structure, land or premises shall be used, and no building or structure shall be hereafter erected, constructed, reconstructed, moved or altered, except for one or more of the following uses (For exceptions, see Section 16, Special Use Permits; and Section 17, Nonconforming Uses.):

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.
3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels
6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.

8. Philanthropic or eleemosynary institutions, other than penal institutions.

9. Accessory uses customarily incident to any of the above uses. . .

. . . .

Section 16. Special use permits.

Any of the following uses may be located in any district by Special Use Permit of the Governing Body, after public hearing, and after recommendation of the Planning Commission, under such conditions as to operation, site development, parking signs, and time limit as may be deemed necessary in order that such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purposes of this Ordinance[1] . . .

. . . .

4. Nursery schools.

. . . .

9. Hospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions.

. . . .

STATEMENT OF THE CASE

This case has its genesis in a zoning dispute arising from the City of Cleburne's requirement and denial of a special use permit to Respondent Jan Hannah for use of property located at 201 Featherston Street as a business consisting of a Level I Intermediate Care Facility for the Mentally Re-

---

[1]There are 20 uses for which a special use permit is required. See J.A. 63-65, Pl. Ex. 1, pp. 1190.2-1191, R. Vol. II, pp. 6, 7; J.A. 65-66, Pl. Ex. 1-A, R. Vol. II, pp. 6, 7; and J.A. 67-68, Pl. Ex. 1-B, R. Vol. II, pp. 6, 7, for entire list.

tarded (ICF-MR). Plaintiffs[2] then brought suit to have the City's zoning ordinance declared unconstitutional and included a pendent state claim under Section 7 of the Texas Mentally Retarded Persons Act of 1977 (Tex. Vernon's Ann. Civ. St. art. 5547-300) which they later withdrew when faced with a potential abstention decision from the District Court.[3] (J.A. 12 and 14; and J.A. 84-87).

On June 8, 1965 the City of Cleburne adopted a comprehensive zoning ordinance which divided the City into fourteen (14) districts with a designation of permitted uses within each district. (J.A. 51, Pl. Ex. 1, p. 1162, R. Vol. II, pp. 6, 7). The Ordinance (Sec. 16) also established certain other uses which were subject to the requirement of obtaining a special use permit. (J.A. 63-65, Pl. Ex. 1, R. Vol. II, pp. 6, 7; J.A. 65-66, Pl. Ex. 1-A, R. Vol. II, pp. 6, 7; and J.A. 67-68, Pl. Ex. 1-B, R. Vol. II, pp. 6, 7).

In July of 1980, Respondent Hannah purchased property located at 201 Featherston Street, in the City of Cleburne,

---

[2]Plaintiffs consisted of Community Living Concepts, Inc. (formerly Cleburne Living Center, Inc.), Jan Hannah, the Johnson County Association for Retarded Citizens (the 5th Circuit determined it did not have standing) and Advocacy, Inc., a non-profit Texas corporation which, although funded pursuant to 42 U.S.C. § 6012 for the sole purpose of advocating the rights of developmentally disabled persons, represented and litigated the individual damage claims of Hannah and Cleburne Living Center in this cause. There were no developmentally disabled or mentally retarded persons who appeared as Plaintiffs in this suit. (J.A. 4-5, 88-89 and 95).

[3]Petitioners also alleged claims under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and a request for curtailment of the City's federal revenue sharing funds under the State and Local Assistance Act of 1972 (31 U.S.C. § 1221, *et seq.)*, recodified at 31 U.S.C. § 6701, *et seq.* (J.A. 11-12). Both the District Court and the 5th Circuit Court of Appeals have denied Respondents any relief under these claims, and they have not been brought forward to this Court by a cross-petition for certiorari from Respondents. (J.A. 99-100; and J.A. 120-121).

for the purpose of leasing it to Respondent Cleburne Living Center, Inc. (CLC), a profit-making Texas corporation, which planned to establish a business consisting of an ICF-MR facility at that location to provide "habilitation services" to thirteen mentally retarded persons in the moderate to mild range of mental retardation.[4] (J.A. 7; R. Vol. II, p. 60; and Pl. Ex. 7, R. Vol. II, pp. 6, 7).

The City required Respondents to obtain a special use permit since the property is zoned R-3 pursuant to Section 8 of the ordinance which permits various forms of multiple zoning dwelling units at a location, such as apartment houses and boarding houses, but specifically excludes "Hospitals, sanitariums, nursing homes or homes. . . . for the insane or feeble-minded or alcoholics or drug addicts" unless a special use permit is obtained pursuant to Section 16 of the Ordinance which requires these facilities to secure a special use permit. The City's Ordinance is in compliance with the Texas Department of Human Resources regulations for ICF-MR facilities requiring that such a facility be located in an incorporated city which is subject to special use permit requirements, local zoning and/or occupancy code requirements. (J.A. 79-80, Def. Ex. 10, R. Vol. III, p. 304).

On July 28, 1980, Respondent Hannah applied to the City for a special use permit. (J.A. 91). The house at 201 Featherston was a 2510 square foot one-story frame house that had only four bedrooms and two baths (a half-bath to be added), with a small unfenced yard located directly across the street from a junior high school. (J.A. 92; J.A. 46; and J.A. 83, Def. Ex. 12, R. Vol. III, p. 347). Respondent CLC planned to house thirteen mentally retarded adult men and women,

---

[4]Respondent Hannah is also CLC's Vice-President and owns one-third of the corporation's outstanding stock. (R. Vol. II, pp. 123 and 170).

along with necessary support staff, at this location. (J.A. 92 and 93). On August 18, 1980, the City's Planning and Zoning Commission held a hearing and then denied the special use permit. (J.A. 91). On October 14, 1980, the City Council of Cleburne held a public hearing on the special use permit application and voted, three to one[5], to deny the special use permit (J.A. 92) after considering the following factors (J.A. 95):

1. The size of the home and the number of people to be housed; (J.A. 24, 25, 26 and 29).
2. The location of a junior high school across the street from 201 Featherston;[6] (J.A. 25, 26, 29 and 30).
3. The home's location on a five hundred (500) year flood plain, (J.A. 28).
4. Concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take; (J.A. 25).
5. Concern for the fears of elderly residents of the neighborhood; (J.A. 29).
6. The attitude of a majority of owners of property located within two hundred (200) feet of 210 Featherston; (J.A. 25 and 29).
7. In general, the presentation made before the City Council. (R. Vol. II, p. 15).

---

[5]Of the three City Councilmen who voted against the permit, Alfred Johns was a black American (J.A. 28), who had been on the Board of Directors of the C. C. Cook Developmental Center, a school for the mentally retarded, for three years (J.A. 26), and Arval Martin had a mentally retarded granddaughter. (J.A. 30).

[6]There was another location in the City of Cleburne which was located on an off street affected by less traffic which City officials felt was more appropriate for an ICF-MR facility for thirteen unrelated mentally retarded adult men and women. (J.A. 45).

The District Court applied the rational basis test to the Ordinance, as written and as applied, and found it to be rationally related to legitimate purposes and interests of the City of Cleburne. (J.A. 103). Furthermore, the City's actions were found not to be arbitrary, capricious or irrational. (J.A. 103).

The 5th Circuit determined that no fundamental interest was involved but established that mentally retarded persons were a "quasi-suspect" class for Equal Protection analysis and, therefore, applied an "intermediate" level of scrutiny, requiring that the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives, to the review of the ordinance. While the panel found that the interest asserted by the City was substantial in nature, it found that there was not the required substantial nexus between the asserted interests and the Ordinance, and, therefore, held that the Ordinance violated the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

The mentally retarded are not a "quasi-suspect" class for Equal Protection analysis because they do not meet the indicia of "suspectness" which is necessary to accord that status to a group. Mentally retarded men and women are individuals who do not constitute a "discrete and insular minority," and whose disability while immutable, is related to the stereotypical thinking associated with the mentally retarded as a group. Nor are they a politically powerless group subjected to prejudice. The last thirty-five years have produced genuine concern and understanding of the condition of the mentally retarded and have ignited a wellspring

of political advocacy as well as legislation designed to protect the rights of the mentally retarded.

The Ordinance which requires the owners of a business such as an intermediate care facility for the mentally retarded to obtain a special use permit to operate such a profit-making facility is rationally related to legitimate objectives of the City of Cleburne. The denial of the request for a special use permit to operate the care facility by the members of the Cleburne City Council was based on their determination that the location and structure were inappropriate to house thirteen unrelated mentally retarded men and women and two full-time staff members and was rationally related to legitimate purposes and interests of the City of Cleburne.

The Fifth Circuit's decision in this case jeopardizes state, local and federal legislation intended to benefit the mentally retarded by failing to recognize that the mentally retarded are different from the rest of society and should be accorded different treatment. The decision below also is contrary to the decision of this Court in *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 314 S.E.2d 218 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984), and the principles established by this Court's decisions in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973), *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562 (1976), and *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982).

ARGUMENT

I. THE MENTALLY RETARDED DO NOT POSSESS SUFFICIENT INDICIA OF "SUSPECTNESS" TO BE A "QUASI-SUSPECT" CLASS

The Fifth Circuit has held that the City of Cleburne's zoning ordinance, as written and as applied, denies mentally retarded individuals their rights to Equal Protection. This Court has determined that "[t]he Equal Protection Clause was intended as a restriction on state legislative action with elemental constitutional premises." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394 (1982).

In analyzing a legislative classification as the basis of an Equal Protection claim, it is necessary for a court to determine if the classification impinges upon a fundamental right. The Fifth Circuit found that the Respondents did not identify any fundamental rights that were impaired by the Cleburne Ordinance. (J.A. 123). Furthermore, this Court has determined that the mentally retarded do not have a fundamental right to residential placement. See *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981).

If a court is satisfied that a fundamental right has not been impinged, its Equal Protection analysis then shifts to whether the ordinance or statute, as written and as applied, involves a "suspect" or "quasi-suspect" classification. If either the exercise of a fundamental right is impinged or a classification disadvantages a "suspect" class, strict scrutiny is applied by the courts in determining whether a "classification has been precisely tailored to serve a compelling governmental interest." *Plyler v. Doe, supra*, 457 U.S. at 217. The Fifth Circuit, however held that mental retardates do not constitute a "suspect" class. (J.A. 125). There-

fore, the focus of a court shifts to an analysis of whether mentally retarded individuals should be accorded "quasi-suspect" status, with attendant "intermediate" or "heightened" scrutiny. In order to withstand "intermediate" scrutiny, a statutory classification which affects a "quasi-suspect" group "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457 (1976). If neither a fundamental right is involved nor is "suspectness" or "quasi-suspectness" attributed to a group, then a legislative classification is scrutinized at the rational basis level, which the District Court applied to the City of Cleburne zoning ordinance, and found to pass constitutional muster on the basis that the "zoning ordinance as written and as applied to the Respondents, is rationally related to legitimate purposes and interests of the City of Cleburne." (J.A. 103). See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40, 55, 93 S.Ct. 1278, 1300, 1308 (1973).[7] The District Court also determined that the Ordinance "is not arbitrary, capricious or irrational." (J.A. 103).

"Quasi-suspectness" is a term not easily susceptible to or capable of definition, but is an evolving concept which the courts have attempted to determine on a case by case basis. While it is unclear which precise criteria determine "quasi-suspect" status, the courts have borrowed the criteria or indicia of "suspect" status to decide whether a class is entitled to "quasi-suspect" status. This Court has extended

---

[7]The Supreme Court of Georgia affirmed the decision of the Georgia Superior Court in its application of the rational relation test to the resolution (ordinance), even though the "Resolution does contain separate classifications for mentally ill or retarded individuals." *Macon Association for Retarded Citizens, supra*, 314 S.E.2d at 221.

"quasi-suspect" status to classifications based on gender[8] and on occasion to illegitimacy.[9] However, it is unclear as to which criteria are relevant in determining "quasi-suspect" status and how much weight they should be given.

This Court has focused upon four primary indicia of "suspectness," some of which must be present to accord "quasi-suspect" status to a particular group or class. First, this Court has examined whether the class is a "discrete, insular minority" referred to in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, 58 S.Ct. 778, 783-784, n.4 (1938). Second, this Court has asked whether the classification is based on immutable characteristics. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973). Third, the Court tries to determine if the class has been "subjected to a history of purposeful unequal treatment." *San Antonio Independent School District v. Rodriguez*, *supra*, 411 U.S. at 28. Finally, the Court seeks to answer the question whether the class has been "relegated to ... a position of political powerlessness." *Rodriguez*, *supra*, 411 U.S. at 28.

THE MENTALLY RETARDED ARE NOT A "DISCRETE, INSULAR MINORITY"

Mentally retarded persons are not within the scope of a "quasi-suspect" class because they do not constitute a "discrete, insular minority" as envisioned by this Court in *Carolene Products*, *supra*. *Webster's Third New Inter-*

---

[8] *Craig v. Boren*, *supra*, 429 U.S. at pp. 197-199 (1976).

[9] This Court has held that past discrimination against illegitimates justified "quasi-suspect" status. *Matthews v. Lucas*, 427 U.S. 495, 505-506, 96 S.Ct. 2755, 2762-2763 (1976). However, this Court applied the rational relation test to illegitimates in *Labine v. Vincent*, 401 U.S. 532, 537-539, 91 S.Ct. 1017, 1020-1021 (1971).

national Dictionary of the English Language Unabridged, 1981 edition, defines the word, "discrete," as "possessed of definite identity or individuality: constituting a separate entity: detached or separate" and as "distinct." "Insular" is defined in the same publication as "insulated, isolated, [or] detached." "Mental retardation" is defined by the American Association on Mental Deficiency as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period [before the age of 18]." (Pl. Ex. 27, pp. 2 and 5, R. Vol. III, p. 287, 288). Dr. Phil Roos defined "mental retardation" as essentially a problem of learning manifested in difficulty with abstract thinking, judgment, problem solving and retention, and which includes problems of social adjustment and economic productivity. (J.A. 37-38). It is a varied condition ranging from mildly and moderately retarded to severely and profoundly retarded with IQ as the basic measurement device as well as adaptive behavior and medical classification. (J.A. 38). Mild mental retardation, which is the mildest level of mental retardation, includes those individuals whose intelligence is between an IQ of 50 and an IQ of 70, and constitutes approximately 89% of all mentally retarded persons. (J.A. 39). Moderate mental retardation includes those with IQ's of roughly 35 to 50 and constitutes roughly 5% of the mentally retarded population. (J.A. 39).

Therefore, it would be necessary to subject an individual to IQ tests to determine if he or she were in the protected class. Those with an IQ of 69 or less would become part of a "quasi-suspect" specially protected class, and those with an IQ of 70 or more would not qualify for this special solicitude from the courts. To further complicate any determination as

to whom "quasi-suspectness" should be granted, the *Manual for Training of Surveyors in Assessing Active Treatment as Required by the Federal Regulations for Intermediate Care Facilities for Mentally Retarded Persons (45 CFR 249.13)*, (Pl. Ex. 27, R. Vol. III, pp. 287, 288), states at p. 3 that

> IQ is *not* an *immutable* number that emerges in precise and automatic fashion from the administration of an intelligence test. Each IQ score must be interpreted by a trained and experienced examiner, considering all the facts that may have influenced the person's performance on the test, including associated sensory and motor dysfunctions. (emphasis supplied).

Furthermore, there is no one standardized IQ test to measure intelligence. In fact, the American Association on Mental Deficiency (AAMD) classification system for degrees of retardation in measured intelligence recognizes different maximum IQ levels which constitute the outer parameters of mental retardation.[10]

The second major aspect of the definition of mental retardation concerns "adaptive behavior," which means how well or to what degree the individual has acquired, and uses, skills necessary for independent living. (Pl. Ex. 27, p. 3, R. Vol. III, pp. 287, 288). Just as with the measurement of intelligence, there are also different scales for measuring adaptive behavior, among the most widely used of which are the AAMD Adaptive Behavior Scale and the Vineland Social Maturity Scale. (Pl. Ex. 27, p. 3, R. Vol. III, pp. 287, 288). As an example of what is meant by adaptive behavior, the AAMD scale covers eating, dressing, toileting, and other

---

[10]Mild retardation registers on the Wechsler IQ scale from 69-55 and on the Stanford-Binet IQ scale from 68-52. (Pl. Ex. 27, p. 3, R. Vol. III, pp. 287, 288).

self-help skills, sensorimotor development, money handling skills, language development, number and time concepts, occupation, self-direction, responsibility and social skills; and the Vineland scale includes self-help skills, self direction, occupation, communication, locomotion, and socialization. (Pl. Ex. 27, p. 4, R. Vol. III, pp. 287, 288). However, although adaptive behavior is also classified as mild, moderate, severe, or profound, measures of adaptive behavior are less standardized than tests of intelligence, and it is not possible to specify scores for these levels. (Pl. Ex. 27, pp. 3, 4, R. Vol. III, pp. 287, 288). As with the IQ, a single-score measure of adaptive behavior would in any event, be of no use in planning a program for a mentally retarded individual. (Pl. Ex. 27, p. 4, R. Vol. III, pp. 287, 288). Thus, those individuals with certain levels of adaptive behavior below a certain level would qualify for "quasi-suspect" solicitude from the courts while those above that level would not.

Mild retardation, which as already noted includes 89% of all mentally retarded persons, is hardly discernible on informal contact, unlike race or gender which is immediately discernible. (J.A. 39). Some mentally retarded can become self-sufficient, economically productive members of society, in fact, most become "invisible" after they leave school, whereas, at the other end of the spectrum many of the profoundly retarded are devoid of any degree of self-sufficiency and require institutionalization. (J.A. 39). This description given by Dr. Roos is a far cry from the "discrete, insular minority" envisaged by this Court in *Carolene Products, supra.* Mentally retarded persons are in reality a "large, diverse and amorphous class" and as such they do not qualify for "quasi-suspect" status. See *Rodriguez, supra,* 411 U.S. at 28.

THE CHARACTERISTICS OF THE MENTALLY RETARDED ALTHOUGH IMMUTABLE ARE RELEVANT TO LEGISLATIVE CLASSIFICATION

Neither should the mentally retarded be accorded "quasi-suspect" status because mental retardation is basically an immutable characteristic.[11] Mental retardation has been defined as a problem of a deficit in intellectual development and social adaption. (J.A. 38). However, for those very reasons mental retardation is a legitimate classification for legislative purposes. The fact is that "[t]he importance of immutability as an indicium of suspectness should not . . . be overrated. . . . Immutability therefore cannot serve as a touchstone of suspectness.[12] One constitutional authority has stated that "[f]orbidding blind people to pilot airplanes will do little to encourage eyesight, but such a prohibition will obviously stand nonetheless, since the classification fits perfectly a different goal."[13] Similarly, the stereotypical characteristics of the mentally retarded dealing with a reduced ability to learn and lack of social adaptation are relevant to legislative classifications which govern the care of the mentally retarded. These characteristics of the mentally retarded reduce their ability to care for themselves so they are relevant to legislative classifications.

---

[11]Dr. Phil Roos testified that mental retardation traditionally is irreversible but that there may be some amelioration of the condition. (J.A. 38).

[12]*Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model,* 90 Yale L. J. 912, 918 (1981).

[13]John H. Ely, *Democracy and Distrust: A Theory of Judicial Review,* (Cambridge, Massachusetts: Harvard University Press, 1980), p. 155; Michael J. Perry has written in his article entitled *Modern Equal Protection: A Conceptualization and Appraisal,* 79 Columbia L.Rev. 1023, 1066 (1979), that "No one would argue, for example, that a person irremediably blind from birth ought to enjoy the same opportunity to drive a car as anyone else."

This legislative concern of the City of Cleburne for the care of those possessing lesser intelligence and social adaptation is likewise reflected in the City's requirement that those who wish to operate a nursery school for children must also obtain a special use permit. (J.A. 68, Pl. Ex. 1, p. 1190.2, R. Vol. II, pp. 6, 7). Any person who has mentally retarded children (even if they are now adults) or children who are not mentally retarded, may live with those children in any zoning classification in Cleburne; however, if that same person goes into the business of keeping other mentally retarded adults and rendering "habilitation services" under a Medicaid contract, such person must run that business in the properly zoned area in structures that are appropriate. Likewise, if a person goes into the business of keeping children of others, as distinguished from his own, such person must conduct that business in an area that is properly zoned with appropriate facilities. Therefore, Jan Hannah, a businesswoman, was required to obtain a special use permit from the City of Cleburne to care for and keep the mentally retarded and render "habilitation services" to them at 201 Featherston St.

In holding that the mentally retarded constitute a "quasi-suspect" class, the Fifth Circuit panel totally ignored the relationship of the disability to the stereotypical thinking associated with mentally retarded persons, which Judge Garwood termed the "threshold requirement for scrutiny beyond the rational basis level". (J.A. 142). In other words, to establish this threshold requirement, the panel should have determined whether the class of the mentally retarded lacks a

> significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either gen-

> erally or in respect to the regulatory area under consideration.

(J.A. 142). Distinctions based on sex and on occasion legitimacy come within the ambit of "quasi-suspectness" for Equal Protection analysis and are "generically different" from a classification based on mental retardation. (J.A. 139). Judge Garwood is entirely accurate in his statement that the mentally retarded "*are* materially different from the rest of society, and are so as a result of their class-defining characteristics." (emphasis in the original). (J.A. 140). Treating mentally retarded people normally will not make them normal. (J.A. 41).

As this Court observed in *Frontiero v. Richardson, supra,* 411 U.S. at 686:

> . . . what differentiates sex from such *non-suspect statuses as intelligence or physical disability,* and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.* (emphasis supplied)

Subsequently, in *Murgia, supra,* 427 U.S. at 313, this Court again made reference to the relationship of the stereotype characteristic to the actual ability, holding that age did not constitute a "suspect" class and applied the rational basis test.[14] The Third Circuit heeded the *Frontiero* and *Murgia* decisions in deciding that mentally ill persons were not a "suspect" class in *Doe v. Colautti,* 592 F.2d 704 (3rd Cir.

---

[14]The Fifth Circuit notes that the Cleburne Ordinance discriminates between the mentally retarded and the elderly who also require supervision but for whom group homes may be established in an R-3 district without a special use permit. See J.A. 125-126. This comparison of two divergent groups such as the elderly and the mentally retarded is, of course, inaccurate, because these groups have a different set of needs and impact the neighborhood differently.

1979). Although mental retardation is a totally different disability than mental illness, the rationale of the relationship between the actual disability and the stereotype characterization is applicable to the mentally retarded. The Eighth Circuit, in *Fowler v. U.S.*, 633 F.2d 1258 (8th Cir. 1980), acknowledged the relevance of a legislative classification of the mentally retarded for employment purposes and only applied a rational basis review to the U.S. Government Civil Service regulations regarding the mentally retarded. In addition, the court in *Upshur v. Love*, 474 F.Supp. 332, 337 (N.D. Cal. 1979), relied upon *Murgia* in determining that the visually handicapped were not entitled to "suspect" status because "classifications based on blindness often can be justified by the different abilities of the blind and the sighted." On this basis, the district court applied the rational basis test even though the "blind are a small, politically weak minority that has been subjected to varying forms of prejudice and discrimination." *Upshur, supra.*

ATTITUDES HAVE CHANGED TOWARD THE MENTALLY RETARDED

The third indicia of "suspectness" deals with whether the mentally retarded have experienced a "purposeful history of past discrimination." The panel based its finding of historical prejudice and political powerlessness on conditions that existed in the first half of the century but that have since ceased to exist or changed dramatically since 1950. Dr. Phil Roos testified that while mentally retarded persons may not have been well treated in the past, this is no longer the situation:

Q. What happened in 1950?

A. A number of things — a presidential panel on mental retardation was established, which later became the

President's Committee on Retardation, which became a strong and viable advocate for retarded persons at the national level. Our own association, the Association for Retarded Citizens, was founded in 1950, and became a very strong consumer advocate voice in the nation. A new philosophy began to permeate the field of mental retardation and other disabilities; consumerism became an important force.[15]

* * *

Q. Well, has the public a good understanding of mental retardation today?

A. It has improved in the last few years. This has been due in part to media coverage, and to the picturing of mentally retarded people through the media as real, genuine human beings.[16]

There is a difference between discrimination that is harmful to the mentally retarded individual against whom discrimination is practiced and the lack of additional benefits received by that mentally retarded individual to compensate for his or her handicap. The mentally retarded no longer exist in the negative discriminatory stage of thirty-five years ago. They now have entered the additional benefit stage which is being handled legislatively.

Also essential to an analysis of discrimination is the concept of whether or not the stereotypical characteristics of the mentally retarded reflect accurately on the ability of the mentally retarded to perform. The mentally retarded *do* have a reduced ability to perform and contribute to society as has already been discussed. This concept has prevented other groups such as the aged, *Murgia, supra*, and the mentally ill, *Doe v. Colautti, supra*, from establishing themselves as "quasi-suspect" groups.

---

[15] J.A. 40.

[16] J.A. 40.

THE MENTALLY RETARDED ARE NOT A POLITICALLY POWERLESS GROUP

Likewise, the mentally retarded are not a politically powerless group. This fact is evidenced by the various legal reforms concerning the rights of the mentally retarded that have occurred in many states as well as by the enactment of federal legislation aimed at continually improving the conditions of the handicapped. See Tex. Vernon's Ann. Civ. St. art. 5547-300 (Texas Mentally Retarded Persons Act of 1977)[17]; 29 U.S.C. § 794 (the Rehabilitation Act of 1973); 20 U.S.C. § 1401, *et seq.* (The Education for All Handicapped Children Act); 42 U.S.C. § 6000, *et seq.* (The Developmental Disabilities Services and Bill of Rights Act); 42 U.S.C. § 1396d(d) and § 1397 (Social Security Amendments of 1974); and Department of Transportation and Related Agencies Appropriation Acts, 1975-1984. Additionally, 22 states have enacted statutes mandating in various ways and degrees the location of community homes in residential areas.[18]

The proliferation of advocacy and representative groups for the handicapped bears witness to their growing political

---

[17]The legislature of the State of Texas has provided for the protection of the rights of the mentally retarded in the Mentally Retarded Persons Act of 1977 (Vernon's Ann. Civ. St. art 5547-300) including the "right to live in the least restrictive habilitation setting appropriate to the individual's needs and be treated and served in the least intrusive manner appropriate for the individual's needs." Section 15. The Respondents, in fact, alleged violations of this Act in their Original Complaint; however, they opted to no longer pursue these pendent state claims and voluntarily dismissed them when faced with possible abstention by the district court. (J.A. 84-87).

[18]Roberto, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"* 28 Wayne L. Rev. 1349, 1378 (1982).

power. In the case at bar two such groups are interested — Advocacy, Inc., a legal advocacy group funded under 42 U.S.C. § 6012 (acting both as an attorney for this business corporation and as a plaintiff), and the Johnson County Association for Retarded Citizens, which does not have standing in this case. These legislative acts are evidence of the fact that needs of the mentally retarded have been and should be addressed legislatively rather than by the judiciary. The commentators are legion in their espousal of the legislative approach over the clearly less preferred litigious constitutional approach in promoting and protecting the rights of the handicapped, including the mentally retarded.[19] Indeed, this Court has held that courts "ought not to pass on questions of Constitutionality . . . unless such adjudication is unavoidable." *Harris v. McRae*, 448 U.S. 297, 307, 100 S.Ct. 2671, 2683 (1980).

Respondents are asking the courts to accomplish that which the City Council of Cleburne and the Congress of the United States have declined to do. This Court has held that 42 U.S.C. § 6010 does not create substantive rights for the mentally retarded. *Pennhurst, supra*, 451 U.S. at 20.

---

[19]Johnson, *Zoning and Community Group Homes for the Mentally Retarded — Boon or Bust?*, 7 Ohio No. L. Rev. 64 (1980); Roberto, *Can the Mentally Retarded Enjoy "Yards that are Wide?"*, 28 Wayne L. Rev. 1349 (1982); Reiner, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W.Va. L. Rev. 669 (1980); Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. Rev. L. & Soc. Change 137 (1975).

II. THE RATIONAL BASIS LEVEL OF REVIEW SHOULD BE APPLIED TO LEGISLATION AFFECTING THE MENTALLY RETARDED

The Equal Protection Clause requires that all persons similarly situated be treated alike, but it does not require "things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. State of Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882 (1940). The initial discretion to determine what is "different" and what is the "same" resides in the governing body of a governmental entity which must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private and that account for limitations on the practical ability of the governmental entity to remedy every ill. *Plyler v. Doe*, *supra*, 457 U.S. at 216.

The enactment of reasonable zoning regulations constitutes a proper exercise of a city's police power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926). The City of Cleburne was granted the power to zone by Tex. Vernon's Ann. Civ. St. art. 1011a, and art. 1011b authorized the City Council to divide the City into zoning districts. The Texas Supreme Court has determined that these grants of authority to the cities are valid exercises of police power and are constitutional. *Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex.1934). This Court has held its "scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives." *Foley v. Connelie*, 435 U.S. 291, 296, 98 S.Ct. 1067, 1070 (1978)[20]

---

[20]This holding reflects a noticeable trend in this Court's decisions away from strict judicial scrutiny to a rational level of review regarding restraint upon classifications dealing with aliens.

The City's Comprehensive Zoning Ordinance specifically regulates the "density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes." (J.A. 49-50, Pl. Ex. 1, p. 1153, R. Vol. II, pp. 6, 7). The purposes of the City's Ordinance include: the lessening of congestion in the streets, securing safety from fire and other dangers and the avoidance of undue concentration of population and protection of the health, safety and general welfare of its City's population; all of which are permissible City objectives. *Village of Euclid, supra,* and *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536 (1974). (J.A. 50, Pl. Ex. 1, p. 1154, R. Vol.II, pp. 6, 7).

Certainly, the City has a legitimate interest in the location and the appropriateness of the structure for an ICF-MR facility established to provide "habilitation services" and residential care under a Medicaid contract for mentally retarded persons. Its interest extends not only to the well being of the residents of the home but to the interests of the surrounding neighbors, which the City must balance. See *Village of Belle Terre, supra.* The Supreme Court of Ohio articulated this balance of interests in *Garcia v. Siffrin Residential Association,* 407 N.E.2d 1369, 1375 (1980), cert. denied, 450 U.S. 911, 101 S.Ct. 1349 (1981):

> It may not be reasonably questioned that there is considerable merit in a law which seeks to maximize the assimilation of mentally retarded persons into the ordinary life of the community in which they live, and to provide places for them to live in surroundings and circumstances as close to normal as possible. However, in carrying out these salutory state programs in aid of some of our citizens, the Constitutional rights of other members of our citizenry, and the Constitutional author-

ity which has been granted to our local governments, must always be guarded and not infringed upon.

It cannot be forgotten that the proposed home is a business, and although it, like any business, provides a service to its customers, it exists for the purpose of profiting from its customers, which in this case are mentally retarded persons.

Jan Hannah presently owns the property and house at 201 Featherston for which she paid $59,000. (R. Vol. II, p. 172). She had leased the property to the Cleburne Living Center, Inc., of which she is the vice-president, for the amount of $15,600 a year, or $1,300 per month. (R. Vol. II, pp. 170, 172) and (Pl. Ex. 7, R. Vol. II, pp. 6, 7). See (J.A. 96-97). Cleburne Living Center, Inc. planned to charge any mentally retarded resident who moved into the proposed facility at 201 Featherston the state per diem rate at that time of $48.10 a day, which with thirteen residents amounts to $625.30 a day and $228,234.50 a year. (R. Vol. II, p. 126). It is these alleged loss of "profits" for which Respondents Hannah and Cleburne Living Center, Inc. brought suit.

The Ordinance in question is directed to where the business of providing a group home for the mentally retarded may be established and in what kind of a building the business may be established, not to where mentally retarded persons may live within the City of Cleburne. The home may be located anywhere in the City by means of a special use permit. (J.A. 62, Pl. Ex. 1, p. 1190.1, R. Vol. II, pp. 6, 7). In fact, Councilman J. T. Bass testified that he would have no objections to a facility for the care of the mentally retarded in Cleburne if it were in a proper location and in a facility that was adequate. (J.A. 24). However, the appropriateness of this structure and particular location for

housing thirteen mentally retarded adult men and women and two full-time staff employees was a factor in the decision of the members of the City Council of Cleburne to deny Jan Hannah a special use permit for the house at 201 Featherston St. The District Court found that "the size of the home and the number of people to be housed" was a factor which entered into the decision of the City Council members to deny the special use permit request. (J.A. 95).

The District Court's finding was based on the testimony of City Councilman Alfred Johns, who stated that one of the reasons he voted to deny the special use permit was because he did not think the property was large enough for the requested facility at 201 Featherston St. (J.A. 25), and because he did not think the property was large enough to afford recreation for at least thirteen mentally retarded persons, (J.A. 26). City Councilman Arval Martin also stated that the location of a facility for the mentally retarded was inappropriate because the yard was too small. (J.A. 29). City Councilman J. T. Bass also testified that the property was not adequate for the use it was intended, including very little yard space and no recreation facilities. (J.A. 24).

The District Court also decided in its Finding of Fact 34 that the proposed home's location in a 500 year flood plain was another factor in the Councilmen's decision to deny Hannah's request for a special use permit. (J.A. 95). This was an important consideration to Councilman Johns. (J.A. 28). Councilman Arval Martin testified that busy traffic at the junior high school across the street from the proposed facility was a consideration of his in denying the special use permit. (J.A. 29). In fact, Jan Hannah and the other shareholders of Cleburne Living Center, Inc. considered purchasing a house at a more appropriate location in Cleburne near

a hospital and doctor's office on an off street with less traffic. (J.A. 45 and 47). However, Jan Hannah did not pursue this location because she did not consider it financially feasible. (J.A. 47). The District Court also determined that the location of a junior high school across the street from 201 Featherston was a factor in the decision of the Council to deny a special use permit. (J.A. 95).

The City of Cleburne Ordinance only establishes a permitted land use at a specific location; it does not confer appropriateness for that use on whatever structure may exist at that location. The structure at 201 Featherston St. is nothing more than a 2510 square foot frame house with four bedrooms and two baths and as such it could not function as a boarding house, a permitted use, for fifteen unrelated adult men and women. (See J.A. 46; and J.A. 82, Def. Ex. 12, R. Vol. III, p. 347). The Ordinance does not confer on this structure the required characteristics of a boarding house or a hospital, which is also a permitted use for this location. The inherent requirements of the intended use of a structure, not the zoning permission, are the determinant factors in establishing the appropriateness of the structure in question. In some instances, the City determines that a structure is appropriate for its intended use by means of its building code and occupancy permits, and in certain other instances, such as nursery schools and residential care facilities for the mentally retarded, the special use permit is the City's mechanism to determine the appropriateness of the intended use of a structure such as the house at 201 Featherston St.[21] The denial of the special use permit did not establish that a residential facility

---

[21]See J.A. 62, Pl. Ex. 1, p. 1190.1, R. Vol. II, pp. 6, 7; and J.A. 49-50, Pl. Ex. 1, pp. 1153-1154, R. Vol. II, pp. 6, 7.

for mentally retarded persons could never exist at 201 Featherston St. at all; rather, it established that under the facts presented to the City Council, the location coupled with the structure located thereon rendered it inappropriate for the intended use of housing thirteen mentally retarded unrelated adult men and women and two full-time Cleburne Living Center employees. It has nothing to do with discrimination. For example, if the site had been built up with fill, the objection regarding the flood plain would have been cured. If the house were larger or the number of people smaller, the overcrowding objection would have been cured.

The Ordinance and its objectives in the instant action[22] are very much the same as those held constitutional in *J. W. v. City of Tacoma, Washington*, 720 F.2d 1126 (9th Cir. 1983). Therefore, this Court should hold that there is a sufficiently close connection between the legislative goal and the Ordinance's means of achieving it and adopt the same stance which the Ninth Circuit Court of Appeals took in holding that the Tacoma Ordinance was constitutional as written:

> The use permit scheme is a rational method of ensuring that group homes with former mental patients do not, because of the special characteristics of their residents, interfere with these interests.

Id. at p. 1130.

Key to the Fifth Circuit's decision in finding the lack of necessary relevance of the Ordinance to the City's goals

---

[22]The Ordinance requires the property owner who desires to operate an intermediate care facility for the mentally retarded to obtain a special use permit in order to operate the facility based on the objectives of the City Ordinance. See J.A. 131. This requirement passes constitutional muster because it is rationally related to legitimate purposes and interests of the City of Cleburne, and is not arbitrary, capricious or irrational. (J.A. 103).

was the panel's assumption that because the property in question was located in an apartment district, "the same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." (J.A. 131-132). First, it is stretching rationality to believe that fifteen unrelated adult men and women could or would live in a 2510 square foot boarding house with only four bedrooms and two bathrooms. This statement is also erroneous because if a boarding house were operated at that location, a mentally retarded person would be free to move into that boarding house. However, the reason that mentally retarded persons who qualify for habilitation training under Medicaid would not move into the house would be because they are not capable of independent living like non-mentally retarded boarders. They require something different. In fact, for a parent or guardian to simply place one of the potential residents of an ICF-MR facility in a boarding house would result in one or more of the following problems:

1. The mentally retarded boarder probably would not be able to maintain a steady job and, therefore, pay the rent.
2. The mentally retarded boarder could not conform to the behavioral norms of the other non-retarded boarders.[23]

---

[23]Indeed, Mrs. Bobbie Northrup, who holds the position of secretary in the Cleburne Living Center, Inc., and currently resides at 201 Featherston, apparently recognized that the mentally retarded are subject to different norms than the non-retarded when she asked a police officer to put a mentally retarded resident of a nearby ICF-MR facility in Keene, Texas, also operated by Community Living Concepts, Inc., (R. Vol. II, p. 170) in a patrol car to scare him because he had been defying her all day. (R. Vol. III, p. 336).

3. The mentally retarded boarder could not keep his room clean.

4. The mentally retarded boarder could not care for himself.

5. The mentally retarded boarder could not cope with any emergency such as a flood or fire which affected the house.

If the mentally retarded person could meet the above requirements, he or she would not qualify for care in an ICF-MR facility.

The very legislation which established funds for, and regulates the adequacy and size of the Intermediate Care Facilities for the Mentally Retarded (ICF-MR), such as the proposed one at 201 Featherston, in effect recognizes that a mentally retarded person who would qualify for "habilitation services" in an ICF-MR facility could not function as a boarder in a boarding house without detailed provisions for his or her habilitation, treatment, care, and maintenance. An ICF-MR facility does not even fall within the Ordinance's definition of a "boarding" or "lodging" house which is:

> A building other than a hotel, occupied as a single housekeeping unit, where lodging or meals are provided for five or more persons for compensation, pursuant to previous arrangements but not for the public or transients.[24]

Whereas by definition the purpose of an ICF-MR facility is to provide training and "habilitation services" for its res-

---

[24](Pl. Ex. 1, p. 1155, R. Vol. II, pp. 6, 7).

idents. These facilities are considered "*institutions*," rather than residences, by the Texas Department of Health.[25]

The State as well as the Cleburne City Council is concerned with the number of occupants to be housed in an ICF-MR facility and has limited the number of residents to a maximum of six. Furthermore, these regulations also require that the facility be located in an incorporated city which is *subject to special use permit requirements*, local zoning and/or occupancy code requirements. (J.A. 36; and J.A. 79-80, Def. Ex. 10, R. Vol. II, pp. 6, 7). Respondents planned to house thirteen residents in order to satisfy their profit requirements. (J.A. 60).

Therefore, to simply place a mentally retarded person in the house at 201 Featherston as a boarder, could in reality be detrimental to that individual. The failure to treat the mentally retarded in a different manner than the non-mentally retarded ultimately discriminates against the mentally retarded and deprives them of the habilitation, care and training which they so badly need to make themselves healthy and productive citizens of this country. This concept has a firm foundation in legislation, e.g., 20 U.S.C. § 1401, *et seq.* (Education for All Handicapped Children Act), and the seminal case of *Board of Education of the Hendrick*

---

[25]Pl. Ex. 25, p. 1, R. Vol. III, 290, Minimum Licensing Standards for Facilities Serving the Mentally Retarded Citizens of Texas: ". . . for the habilitation of individuals based on an active treatment program in institutions of the character defined and covered herein."

Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).[26]

The mentally retarded adults who would be placed in the Cleburne home are unable to learn independent skills in schools or in the institutions from which they would come; that is why they would be placed in this habilitation home under a Medicaid contract with the State. The members of the Cleburne City Council determined the location at 201 Featherston to be inappropriate for the purpose of habilitation of thirteen unrelated retarded men and women who failed to learn independent living skills prior to reaching adulthood and two staff members.

The handicap of the mentally retarded person, per se, requires different treatment from the norm, e.g., handicapped accessibility, specialized education, and appropriate treatment, services and habilitation. In fact, if they cannot be treated differently, it would not be possible for the State to provide the Medicaid assistance so they can live in a habilitation facility. However, the Fifth Circuit's establishment of the mentally retarded as a new cognizable "quasi-

---

[26] In addition, Congress has promulgated 42 U.S.C. § 6000, *et. seq.* (Developmental Disabilities Services and Bill of Rights Act), which established a federal-state grant program and requires that persons with developmental disabilities have " a right to appropriate treatment, services and habilitation" which "should be provided in the setting that is least restrictive of that person's personal liberty." Department of Transportation and Related Agencies Appropriation Acts, 1975-1984, require that an applicant for federal financial assistance provide certain facilities and services to the disabled. Congress also provided for the establishment of intermediate care facilities and related services for the mentally retarded in 42 U.S.C. § 1396d(d) and 1397 (Social Security Amendments of 1974). Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) provides handicapped individuals with a vehicle to combat discrimination, exclusion, or denial of benefits under any program or activity receiving federal financial assistance.

suspect" class may place in jeopardy the application of the heretofore mentioned federal and state laws protecting the handicapped, including the mentally retarded. By entitling the mentally retarded to a "heightened" level of judicial scrutiny and "quasi-suspectness," the Fifth Circuit's opinion could emasculate the heretofore mentioned laws which protect the handicapped, including the mentally retarded, because it would be a violation of the mental retardate's constitutionally afforded rights to treat him or her in a different manner than a person of greater intelligence, ability, social adaptability, and economic productivity.

Rather than institute a sweeping change throughout the nation which will affect each mentally retarded person indiscriminately without regard to his or her particular developmental level and disability, the Petitioners urge this Court to consider that the condition of each mentally retarded person is unique in that he or she may be classified anywhere at a level ranging from a moderate or mild retardate to an individual possessing severely and profoundly retarded characteristics, with each mental retardate needing a different level and degree of treatment and "habilitation services." See J.A. 142-143.

The Respondents' expert, Dr. Roos, testified at trial that mental illness and mental retardation require "entirely different approaches." (J.A. 38). Judge Garwood and the other dissenters who joined with him found this testimony to be significant in raising the issue in their minds as to whether the "presence of difference in approach" is to be treated as "quasi-suspect." (J.A. 141). Judge Garwood went on to state

> It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-

> four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened" scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"? Are we to review as "quasi-suspect" the failure of governmental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared? Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the non-retarded, but where judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded. (emphasis in the original).

(J.A. 141-142).

This Court has had occasion to decide whether the mentally retarded who reside in state institutions have been afforded appropriate treatment. *Youngberg, supra.* This Court determined that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the Courts to specify which of several professionally acceptable choices should have been made." *Youngberg, supra,* 457 U.S. at 321. In holding that this enumerated standard was "lower than the 'compelling' or 'substantial' necessity tests," this Court declined to accord "suspect" or "quasi-suspect" status to

even those mentally retarded individuals who reside in state institutions. *Youngberg, supra*, 457 U.S. at 322. It was the opinion of the Court that requiring the state to meet the "compelling" or "substantial" necessity tests "would place an undue burden on the administration of institutions [for the mentally retarded] . . . and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents." *Youngberg, supra*, 457 U.S. at 322.

As Judge Garwood has suggested, the Fifth Circuit panel's decision to classify all the mentally retarded as a "quasi-suspect" class with attendant "heightened" scrutiny will obviously involve the courts in the issue which will inevitably be raised regarding the adequacy of medical treatment for the mentally retarded. It is important to consider the corollary of these consequences — the federal judiciary's intrusion into the state's regulations regarding the mentally retarded. Judge Garwood determined:

> State regulations will inevitably distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view *a major and unwarranted extension of federal judicial powers*, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. (emphasis supplied).

(J.A. 143).

Furthermore, the Fifth Circuit's decision in the case below will greatly impact the autonomy of state, local and school

authorities to interpret their own legislation. This Court has held in *Board of Education of Rogers, Arkansas v. McCluskey*, 458 U.S. 966, 969, 971, 102 S.Ct. 3469, 3471 and 3472 (1982) that a school "[b]oard's interpretation of its regulations controls" over a judicial interpretation of the regulations because "federal courts were not authorized to construe school regulations." In holding that the Court of Appeals erred in substituting its own notions for the school board's definition of its rules, this Court in *McCluskey* relied upon its prior holding in *Wood v. Strickland*, 420 U.S. 308, 325, 95 S.Ct. 992, 1002 (1975):

> "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement."

Supra, 458 U.S. at 970. Unless reversed, the Fifth Circuit's decision in the case below will stand as a harbinger of unnecessary and unwarranted judicial interference in state, local and school legislation and the ability of those entities to interpret their own legislation.[27]

---

[27]Justice Rehnquist prescribed a caveat for review of the Equal Protection Clause in *Trimble v. Gordon*, 430 U.S. 762, 779, 97 S.Ct. 1459, 1469 (1977):

> [I]n providing the Court with the duty of enforcing such generalities as the Equal Protection Clause, the framers of the Civil War Amendments placed it in the position of Adam in the Garden of Eden. As members of a tripartite institution of government which is responsible to no constituency, and which is held back only by its own sense of self-restraint, . . . we are constantly subjected to the human temptation to hold that any law containing a number of imperfections denies equal protection simply because those who drafted it could have made it fairer or a better law.

III. THE FIFTH CIRCUIT DECISION IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL

In determining whether mentally retarded persons constitute a "quasi-suspect" class, the Fifth Circuit incorrectly characterized the question "as one of first impression" among appellate courts. See J.A. 123. The Fifth Circuit's treatment of what it determined to be a novel issue is, however, contrary to the decision of the Ninth Circuit in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983) and a decision of its own panel in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), both of which held that the handicapped, which includes the mentally retarded, were a non-suspect class for which rational basis level review is appropriate.

In *California Association of the Physically Handicapped*, the plaintiff brought suit under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Fourteenth Amendment for the FCC's refusal to include the handicapped in its EEO program, arguing that the handicapped should be considered a "suspect" class and that under the strict scrutiny standard applicable to a "suspect" class, the FCC's actions should be held unconstitutional. In applying the rational basis test to distinctions involving non-suspect classifications, the Ninth Circuit unequivocally stated the following:

> No appellate court, however, has held that the handicapped are a suspect class. *Brown v. Sibley*, 650 F.2d 760, 766 (5th Cir. 1981). We decline to be the first.

In *Brown*, which the Ninth Circuit relied on in *California Association of Physically Handicapped*, the Fifth Circuit

panel was likewise presented with a handicapped plaintiff's request for strict judicial scrutiny under the Fourteenth Amendment and review under Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794) of a state agency's policy against the visually impaired working in supervisory positions. The Fifth Circuit held that "the only inquiry is whether [the defendant state agency's] alleged classification scheme 'is rationally related to the [state agency's] objective' " and stated that:

> No Court has ever declared that handicapped persons constitute a suspect class for purposes of equal protection analysis, and we decline to do so today.

Brown, supra, 650 F.2d at 766.

Both the *Brown* and *California Association of Physically Handicapped* cases were brought within the context of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and ruled on the Equal Protection status of handicapped persons as defined by the Rehabilitation Act, which specifically includes mentally retarded persons.[28] The Eighth Circuit has also applied the rational basis level of review to U.S. Civil Service regulations dealing with employment of the mentally retarded. *Fowler, supra.* In *Youngberg*, this Court explicitly refused to apply either a "compelling" or a "substantial" necessity test in evaluating conditions at the Pennhurst State School. *Supra*, 457 U.S. at 322.

Therefore, the decision of the Fifth Circuit panel in this case is novel, not because it is a case of "first impression"

---

[28]The Rehabilitation Act, 29 U.S.C. § 706, defines a handicapped individual as:

> . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

but rather because it is at odds not only with the Ninth Circuit and the Fifth Circuit panel in *Brown*, but also because it is contrary to the principles established in *Frontiero, supra*, 411 U.S. at 686. This Court in *Frontiero*, stated that sex is an immutable characteristic and held that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny but carefully distinguished "... sex from such *non-suspect statuses as intelligence or physical disability*" for the reason "that the sex characteristic frequently bears no relation to ability to perform or contribute to society." (emphasis supplied). *Supra*, 411 U.S. at 686.

Furthermore, at the district court level, *Anderson v. Banks*, 520 F.Supp. 472, 512 (S.D. Ga. 1981) held that mentally retarded persons were not a "quasi-suspect" class. Two other district courts have also failed to confer "quasi-suspect" status on mentally retarded persons, even when they are institutionalized, *Developmental Disabilities Advocacy Center, Inc. v. Melton*, 521 F. Supp. 365, 371 (D.N.H. 1981) and *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973).

The only district court decision to apply a "heightened" level of scrutiny dealing with mentally retarded persons is *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983), which involved the deplorable conditions at the state school for the mentally retarded. The *Olson* court found that mentally retarded persons failed to satisfy the criteria for "suspect" status; however, the court required the state "to show that the disparities in educational opportunity which exist between the mentally

retarded and other citizens substantially furthers important state interests". *Id.* at 490.

The Eighth Circuit resolved the issues presented in *Olson* under North Dakota law and the Education for All Handicapped Children Act (20 U.S.C. § 1401, *et seq.)* without having to reach any Equal Protection issues regarding the mentally retarded.

It is also important to consider that seven out of the fifteen judges who comprise the Fifth Circuit Court of Appeals dissented from the denial of a rehearing en banc by the other eight members of the Court in the decision below. Six out of the seven dissenters stated that "[t]he panel has made a holding no other federal appellate court has" and found the holding "not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration." (J.A. 139).

In holding that the mentally retarded constitute a "quasi-suspect" class for Equal Protection purposes and that legislation regarding the mentally retarded should be given "intermediate" scrutiny, the panel rejected the position that has either been adopted or supported by the Courts of Appeal which have already considered these matters, and a clear majority of the federal district courts which have ruled on the question to date, as well as this Court's holding in *Frontiero* and *Youngberg.*

This is the first case in which "quasi-suspect" status has been accorded a group and attendant "heightened" or "intermediate" judicial scrutiny has been applied by a Circuit Court of Appeals when the stereotype characteristic does reflect a reality of diminished ability. However, neither the status nor the level of scrutiny are appropriate since

the diminished ability must be taken into consideration and legislatively classified in order to bestow a benefit.

Furthermore, this Court's recent dismissal of the appeal for want of a substantial federal question in *Macon Association for Retarded Citizens, supra,* indicates that the mentally retarded should not be considered "quasi-suspect" nor should "heightened" or "intermediate" scrutiny be applied to test legislation affecting the mentally retarded. One of the questions presented to this Court on appeal was:

> Did Georgia Supreme Court err in applying rational basis test for examining equal protection claim generated by denial of housing permit to home for mentally retarded in that stricter standard of scrutiny should have been applied?

53 U.S.L.W. 3191 (September 25, 1984). The Fifth Circuit's decision in the instant case is in direct conflict with this Court's decision in the *Macon Association for Retarded Citizens* case regarding the level of scrutiny for Equal Protection analysis to be applied to a zoning ordinance which affects mentally retarded persons. This Court's dismissal of the appeal for want of a substantial federal question constitutes a decision on the merits. *Hicks v. Miranda,* 411 U.S. 332, 344, 95 S.Ct. 2281, 2289 (1975).

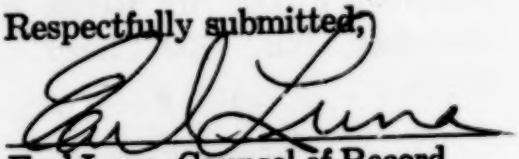
The *Macon Association for Retarded Citizens* case is almost a direct parallel to the case at bar. It involved a zoning resolution (ordinance) that established "permitted" uses and "conditional" uses of the land in each zoning district. The "conditional" use is akin to the special use permit in the present case, which permits the use in certain circumstances after a hearing on the proposed use. The Macon-Bibb County zoning resolution (ordinance) provided for a "conditional" use permit for homes for the men-

tally retarded in certain zoning districts, but not in the single-family residential zoning districts. The Macon Association for Retarded Citizens applied for an amendment to the zoning resolution (ordinance) in order to permit the construction of two group homes for mentally retarded persons in the single-family residential zones. Petitioners before the Supreme Court of Georgia contended that application of the rational relation test for Equal Protection analysis of the ordinance was improper since they asserted that mentally retarded persons constitute at least a "quasi-suspect" class thereby being entitled to a middle-tier level of review. *Macon Association for Retarded Citizens, supra,* 314 S.E. 2d at 220. The Supreme Court of Georgia affirmed the decision of the Georgia Superior Court in its application of the rational relation test to the resolution (ordinance), even though "[i]t is true that the Resolution does contain separate classification for mentally ill or retarded individuals." *Macon Association for Retarded Citizens, supra,* 314 S.E.2d at 221.

CONCLUSION

For these reasons discussed above this Court should declare that the mentally retarded do not constitute a "quasi-suspect" class, the challenged zoning ordinance should be scrutinized at the rational basis level of review, found to be constitutional, as written and as applied, the judgment of the Court of Appeals should be reversed insofar as these issues are concerned and the judgment of the District Court should be affirmed.

Respectfully submitted,



Earl Luna, Counsel of Record
Robert T. Miller, Jr.
Mary Milford

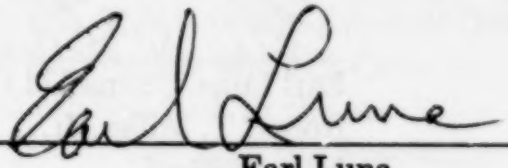
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

ATTORNEYS FOR
PETITIONERS

December 26, 1984

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Brief for Petitioners on all parties required to be served by depositing three copies of the Brief for Petitioners in the United States mail, on the 21st day of December, 1984, with first-class postage prepaid addressed to the following counsel of record for Respondents at the address indicated, to-wit: Mr. Renea Hicks and Ms. Diane Shisk, Advocacy, Inc., 7700 Chevy Chase Drive, Austin, Texas 78752.



Earl Luna

Counsel of Record for Petitioners

Office - Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVAS
CLERK

No. 84-468

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

EARL LUNA,
Counsel of Record
Robert T. Miller, Jr.
Mary Milford
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582
Counsel for Petitioners

RENEA HICKS,
Counsel of Record
Diane Shisk
Advocacy, Inc.
7700 Chevy Chase Dr.
Austin, Texas 78752
(512) 475-5543
Counsel for Respondents

Petition for Certiorari Filed September 22, 1984.
Certiorari Granted November 13, 1984.

150 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Plaintiffs' First Amended Complaint	3
Defendants' First Amended Original Answer	16
Excerpts from the Transcript	24
Excerpts from Plaintiffs' Exhibit 1	49
Plantiffs' Exhibit 1-A	65
Plaintiffs' Exhibit 1-B	67
Plaintiffs' Exhibit 2	69
Plaintiffs' Exhibit 5	70
Plaintiffs' Exhibit 10	73
Plaintiffs' Exhibit 17	75
Plaintiffs' Exhibit 18	76
Plaintiffs' Exhibit 28	77
Defendants' Exhibit 10	78
Defendants' Exhibit 12	82
Order Requesting Briefs on Pendent State Claims	84
Stipulation of Voluntary Dismissal of Plaintiffs' Pendent State Claims	86
Order of Dismissal of Plaintiffs' Pendent State Claims	87
Opinion of the United States District Court	88
Judgment of the United States District Court	111

TABLE OF CONTENTS — (Continued)

	Page
Opinion of the United States Court of Appeals	112
Opinion of the United States Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc and Dissent	138
Mandate of the United States Court of Appeals	145
Order of the United States Court of Appeals Granting Motion to Recall and Stay of Mandate	146

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
November 26, 1980	Filed COMPLAINT AND Issued (6) SUMMONS.
January 11, 1982	Filed Plaintiffs' FIRST AMENDED COMPLAINT.
January 18, 1982	Filed DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER.
April 26, 1982	Court Trial.
July 28, 1982	Filed ORDER directing the parties to submit short letter briefs with the Court no later than August 12, 1982; a hearing on the issues is scheduled for August 13, 1982, at 11:00 a.m.
August 10, 1982	Filed ORDER OF DISMISSAL... that plaintiffs' pendent state claims in this action, as set forth in ¶ 35-37 and 40-42 of the First Amended Complaint are dismissed with prejudice to their refiling.
August 9, 1982	Filed STIPULATION OF VOLUNTARY DISMISSAL OF PLAINTIFFS' PENDENT STATE CLAIMS.
October 4, 1982	Filed MEMORANDUM OPINION — FINDINGS OF FACT AND CONCLUSIONS OF LAW.
October 4, 1982	Filed JUDGMENT . . . it is ORDERED and ADJUDGED that the Plaintiffs, Cleburne Living Center, Inc., et. al., take nothing and that the action be dismissed on the merits.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
October 22, 1982	Filed Plaintiffs' NOTICE OF APPEAL from the final judgment entered on October 4, 1982.
March 5, 1984	Judgment Entered by United States Court of Appeals for the Fifth Circuit.
March 19, 1984	Petition for Rehearing and Suggestion for Rehearing En Banc filed.
July 6, 1984	Petition for Rehearing and Suggestion for Rehearing En Banc Denied by United States Court of Appeals for the Fifth Circuit.
July 16, 1984	Mandate Issued by United States Court of Appeals for the Fifth Circuit.
August 16, 1984	Motion for Stay of Enforcement and/or Recall of Mandate filed.
August 27, 1984	Motion for Recall and Stay of the Issuance of the Mandate Granted by United States Court of Appeals for the Fifth Circuit.
September 7, 1984	Motion for Reconsideration of Order Recalling Mandate filed.
September 19, 1984	Motion for Reconsideration of Order Recalling Mandate Denied by United States Court of Appeals for the Fifth Circuit.
September 22, 1984	Petition for Writ of Certiorari filed.
November 13, 1984	Writ of Certiorari Granted.

[R. Vol. I, p. 64]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLEBURNE LIVING CENTER, INC., JAN HANNAH,
JOHNSON COUNTY ASSOCIATION FOR RETARDED CITIZENS,
and ADVOCACY, INC.,

Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, GEORGE W. MARTI,
Mayor of the City of Cleburne, Texas,
J. T. BASS, ARVAL MARTIN, JR., and ALFRED JOHNS,
members of the City Council of the
City of Cleburne, Texas, and JIM FERGUSON,
City Attorney of the City of Cleburne, Texas

Defendants

CIVIL ACTION NO. CA3-80-1576-F

FIRST AMENDED COMPLAINT

Introduction

1. This action is brought on behalf of a private corporation, an individual associated with that corporation, a private, non-profit organization devoted to the interests of mentally retarded citizens, and the Texas protection and advocacy system for the developmentally disabled against the City of Cleburne and certain of its officials who have acted to prevent the establishment and operation in the community of a family-like group home where mentally retarded citizens would live. The basis for the refusal of the city and its officials to permit the group home's operation is that its residents would be mentally retarded persons. Declaratory and injunctive relief are sought against the city officials, and declaratory, injunctive, monetary, and other forms of relief are sought against the city itself.

[R. Vol. I, p. 65]

Jurisdiction

2. This Court has jurisdiction over the federal claims (which arise under the Constitution and laws of the United States, including 42 U.S.C. § 1983) pursuant to 28 U.S.C. §§ 1331 and 1343(3)-(4) and 31 U.S.C. § 1244(a). The Court has pendent jurisdiction over the state claims, which arise from a nucleus of operative facts common to those giving rise to the federal claims. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201-02. The amount in controversy under 28 U.S.C. § 1331, exclusive of interest and costs, exceeds the value of $10,000. Venue lies in this district and division under 28 U.S.C. §§ 124(a) (1) and 1391(b).

Plaintiffs

3. Plaintiff Cleburne Living Center, Inc. (hereinafter sometimes referred to as CLC), is a small, three-shareholder corporation whose purpose is to establish and operate supervised group homes for mentally retarded citizens. It intends to lease a house at 201 Featherston Street in the City of Cleburne from Jan Hannah to establish a group home for thirteen mentally retarded adults at that address. Plaintiff CLC sues on its own behalf and on behalf of the mentally retarded individuals waiting to move into the Featherston Street group home. Plaintiff CLC is incorporated in the State of Texas and currently maintains an office at 112 East Walnut, Keene, Texas 76059.

4. Plaintiff Jan Hannah is CLC's Vice President and one of its three stockholders. She is the owner of the house at 201 Featherston Street in the City of Cleburne, having purchased it for the purpose of leasing it to CLC for the operation of a group home for mentally retarded citizens. She resides at Route 1, Box 453, Cleburne, Texas 76031.

5. Plaintiff Johnson County Association for Retarded Citizens (hereinafter sometimes referred to as Johnson County ARC) is a non-profit Texas corporation established to advocate for and represent the interests of the mentally

retarded residents of Johnson County. Among its approximately two hundred members are parents of retarded children and adults, mentally retarded persons, at least one of whom is a potential resident of the home, special education teachers and educational diagnosticians employed by the Cleburne Independent School District, [R. Vol. I, p. 66] and other concerned Johnson County residents. As an organization, it supports the establishment of group homes, including the Featherston Street one, for mentally retarded persons. It sues on behalf of mentally retarded persons who are the potential residents of the Featerston Street group home. Plaintiff Johnson County ARC maintains an office at 803 Rose Street, Cleburne, Texas 76031.

6. Plaintiff Advocacy, Inc., is a non-profit Texas corporation formed to protect the legal rights of persons who are developmentally disabled, including those who are mentally retarded. It is a statewide legal advocacy system affiliated with the State Bar of Texas and established pursuant to 42 U.S.C. § 6012. Among the rights for which Advocacy, Inc., advocates is the right of mentally retarded persons to live in group homes in community settings. It sues on behalf of mentally retarded persons who are the potential residents of the Featherston Street group home. Advocacy, Inc., has its office at 5555 North Lamar Boulevard, Suite K-109, Austin, Texas 78751.

Defendants

7. Defendant City of Cleburne is a municipal corporation established pursuant to the laws of the State of Texas. As a Texas municipal corporation, the defendant city has certain powers and duties, among which are certain zoning powers. The City of Cleburne receives substantial federal funds from the United States Department of Treasury, the United States Department of Health and Human Services, the United States Department of Housing and Urban Development, and other federal agencies. The City of Cleburne may be served with process at the offices of its mayor at 302 West Henderson Street, Cleburne, Texas 76031.

8. Defendant George W. Marti is the Mayor of the City of Cleburne. In conjunction with his duties as Mayor, he is the chairman and a voting member of the City of Cleburne City Council. The Mayor's office is located at 302 West Henderson Street, Cleburne, Texas 76031.

9. Defendants J. T. Bass, Arval Martin, Jr., and Alfred Johns are elected, voting members of the City of Cleburne City Council. Under Articles 1011 and 1011a of the Texas Revised Civil Statutes, the City Council is empowered to enact municipal zoning ordinances. The city council is also responsible for granting [R. Vol. I, p. 67] special use permits under the City of Cleburne Zoning Ordinance. The City Council offices of these council members are located at 302 West Henderson Street, Cleburne, Texas 76031.

10. Defendant Jim Ferguson is the City Attorney for the City of Cleburne. In his capacity as City Attorney, he is responsible for the prosecution of violations of the City of Cleburne Zoning Ordinance. His city office is located at 302 West Henderson Street, Cleburne, Texas 76031.

Factual Allegations

11. Plaintiff CLC is incorporated for the purpose of establishing and operating group homes for mentally retarded persons, many of whom are presently institutionalized in large, state-operated facilities housing hundreds of residents. CLC's goals for these people are to provide them with an opportunity to live in a family-like community setting which is more normal and less restrictive of their liberty than an institution and, ultimately, to provide them with the background and understanding necessary to permit them to live as fully and as independently of others as possible.

12. Mental retardation is *not* a disease and it is *not* a mental illness. Instead, it is an impairment in intellectual functioning and adaptive behavior which is often described as an educational problem. Despite their lower level of intellectual functioning, mentally retarded persons have the same hopes, the same fears, and the same feelings and

humanity as any other person. In short, they are full persons, worthy of the same basic respect and dignity accorded other persons.

13. Placement in more normal community settings can under appropriate supervision enable many mentally retarded persons to learn to participate in and contribute to community life. They can learn to cook, shop, manage a household, apply for and be productively employed in jobs, and use and enjoy community amenities such as parks, swimming pools, and libraries that all citizens may use and enjoy.

14. The fact that a person is mentally retarded in no way suggests that that person is dangerous.

15. The present three shareholders and officers of CLC had begun to consider forming a corporation for the purpose of establishing and operating a [R. Vol. I, p. 68] group home for the mentally retarded, and in late June or early July of 1980, they contacted the City of Cleburne and were informed that a special use permit would be required wherever in the city they chose to place the group home.

16. In late July, 1980, Plaintiff Jan Hannah purchased the lot and house at 201 Featherston Street in the City of Cleburne which is officially described as the north two thirds of lot 1, block 498. Jan Hannah then intended and still intends to lease the property to CLC to operate a group home for mentally retarded persons. A ten year lease has been executed, but the group home cannot begin operation until the zoning impediments have been removed.

17. The Featherston Street group home will house thirteen mentally retarded adults and will be operated as a Level I Intermediate Care Facility for the Mentally Retarded (hereinafter sometimes referred to as an ICF-MR) under extensive regulations and guidelines established and administered by the United States Department of Health and Human Services, the Texas Department of Human Resources, the Texas Department of

Mental Health and Mental Retardation, and the Texas Department of Health. It will comply with all applicable and valid statutes, regulations, codes, and ordinances.

18. The structure at 201 Featherston Street is a large, one story frame house containing a living room, an alcove, a dining room, a breakfast room, a kitchen, an attic, a laundry room, four bedrooms, a den, and two baths, with a half bath to be added. It is on a corner lot, and there are front, side, and back yards, as well as a large front porch. Across the street to the north of the Featherston home is a public junior high school which numbers among its students about thirty mentally retarded children between the ages of nine and twenty one years. Directly behind the Featherston home to the south is a two story apartment house. A dentist's office is on the corner northeast of the Featherston home.

19. The people who will live in the Featherston Street group home will be men and women eighteen years of age or older who are mildly or moderately mentally retarded. They will be completely ambulatory.

20. The Featherston Street group home will have twenty four hour supervision, divided basically into eight hour shifts. Besides handling administrative matters, some cooking, and some cleaning chores, the staff will work with the mentally retarded residents to train and teach them in such areas as kitchen management, maintenance, personal budgeting, meal preparation, academics [R. Vol. I, p. 69] related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities. The program for each resident will be flexible, depending on his or her needs, and will be based on an individual program plan prepared for each resident of the group home by an interdisciplinary team. Although a registered nurse will visit the home once a month, there will be no licensed nursing or medical staff in the home or employed by CLC. The residents will have jobs in the community and in a work activity center. They

probably will not have private automobiles. Their stay at the Featherston Street group home will be voluntary, and its length will be indeterminate.

21. The house at 201 Featherston is in a district classified as R-3 — an "[a]partment house district" — by the zoning ordinance of the City of Cleburne. Among the permitted uses in this R-3 zone are the following: apartment houses; multiple dwellings; boarding and lodging houses; fraternity or sorority houses and dormitories; apartment hotels; private clubs or fraternal orders; philanthropic or eleemosynary institutions; and "[h]ospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the ... feeble-minded ...*" (emphasis added). The City of Cleburne has classified the potential mentally retarded residents of the group home as "feeble-minded," and it has classified the use as a "hospital." Based on these classifications, the city required CLC to obtain a special use permit to operate the Featherston Street group home.

22. CLC will not use the Featherston Street group home as a hospital when it begins operating the ICF-MR.

23. Except for the fact that the residents of the home will be mentally retarded, CLC's contemplated use of the Featherston Street group home would be a permitted use under the City of Cleburne zoning ordinance and, consequently, would not require a special use permit.

24. During the first week of August, 1980, after being informed that a special use permit would be necessary to operate the group home at 201 Featherston, CLC paid forty dollars to initiate the special use permit application process.

25. On August 18, 1980, the City of Cleburne's Planning and Zoning Commission conducted a public hearing on CLC's special use permit application. Presentations in support of and in opposition to the permit were made. The [R. Vol. I, p. 70] majority of the arguments against granting the permit were based on the affirmatively stated proposition that the neighborhood around the Featherston Street

home should not have to put up with — to use the vernacular — "mentals." Immediately after the public discussion, the Planning and Zoning Commission voted to recommend that CLC's application for a specific use permit be denied.

26. The decision of the Planning and Zoning Commission to recommend that the special use permit not be granted was based upon an intent to discriminate against mentally retarded persons on the basis of their handicapping condition. Other purported bases for the decision — possibilities of flooding at the Featherston property, traffic concerns, and alleged inadequacy of space in the group home — are merely pretextual and wholly without factual foundation. Moreover, many of the pretextual bases for the recommendation are unrelated to the city's zoning powers. The expression by segments of the Cleburne community of their distaste for mentally retarded persons was the animating force in the Commission's recommendation.

27. On October 14, 1980, the City of Cleburne City Council held a public hearing on whether CLC's application for a special use permit for the Featherston Street group home should be granted or denied. Only one person from each side — those in support and those opposed — was permitted to speak. At the conclusion of the hearing, the City Council voted to deny the special use permit. J. T. Bass, Arval Martin, and Alfred Johns voted against the issuance of the permit. Dale Hannah voted for the issuance of the permit. George W. Marti, the Mayor, did not vote since he only votes in case of ties.

28. The decision of the City of Cleburne, expressed through its city council, and the votes of the three council members to deny CLC a special use permit for the Featherston Street group home was motivated by an intent to discriminate against mentally retarded persons on the basis of their handicapping condition. Any other purported basis for the decision is merely pretextual, without factual foundation, or outside the reach of the city's zoning powers.

29. The City of Cleburne Zoning Ordinance requirement in the first instance that CLC obtain a special use permit for the Featherston Street group home is, on its face, intentionally discriminatory against mentally retarded persons on the basis of their handicapping condition.

[R. Vol. I, p. 71]

Causes of Action

30. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 by acting and by failing to act under color of state law so as to exclude mentally retarded persons from living in a group home in the City of Cleburne based on their status as "mentally retarded" persons.

31. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794) and 42 U.S.C. § 1983 by acting and by failing to act under color of state law so as to exclude mentally retarded persons from living in a group home in the City of Cleburne based solely on their status as "mentally retarded" persons. Section 504 provides:

> No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 706 defines the term "handicapped individual" to include mentally retarded persons. The City of Cleburne receives federal financial assistance.

32. Defendants have violated and continue to violate the rights of CLC and the potential residents of the Featherston Street group home under 31 U.S.C. §§ 1242(a) (1) and 1244 by using the city's zoning powers, programs, and

activities to subject them to discrimination on the basis of the mental retardation of the group home's potential residents.

33. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under the due process clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 by acting and by failing to act under color of state law irrationally and arbitrarily both in requiring a special use permit to operate the group home and in denying the special use permit when it was sought.

34. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, as well as the related [R. Vol. I, p. 72] constitutional right to travel, by acting and by failing to act under color of state law so as to prevent mentally retarded persons from freely choosing their place of residence and from freely associating with persons of their own choosing.

35. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Section 7 of the Mentally Retarded Persons Act of 1977, TEX.REV.CIV.STAT. Art. 5547-300 (hereinafter sometimes referred to as the MRPA). Section 7 of the MRPA. reads:

> Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities. This includes the person's right to live in a variety of living situations, such as the right to live alone, in a group home, with a family, and in a supervised, protective environment.

By not permitting the operation of the group home, the defendants have denied mentally retarded persons the right to live in the least restrictive setting appropriate to their individual needs and abilities.

36. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Article I, § 19, of the Texas Constitution by acting irrationally and arbitrarily both in requiring a special use permit to operate the group home and in denying the special use permit when it was sought.

37. Defendants have violated the rights of CLC and the potential residents of the Featherston Street group home under Article I, § 3, of the Texas Constitution by denying mentally retarded persons rights equal to other similarly situated persons.

Relief

WHEREFORE, the plaintiffs pray that this Court grant the following relief to remedy the violations of the United States Constitution, federal law, the Texas Constitution, and state law described herein:

38. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate the Fourteenth Amendment's guarantee of due process and equal protection of the law and the First Amendment's guarantee of freedom of association and the related constitutional right to travel in that these provisions of the ordinance are facially discriminatory and have been discriminatorily applied to prevent the establishment and operation [R. Vol I, p. 73] of a group home in the City of Cleburne, Texas, and to exclude mentally retarded persons from living in the home, because of their status as "mentally retarded" persons.

39. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Section 504 of the Rehabilitation Act's prohibition against discrimination based on handicap in that these provisions of the ordinance are facially discriminatory and have been discriminatorily applied to prevent the establishment and operation of a group home in the City of Cleburne,

Texas, and to exclude mentally retarded persons from living in the home, solely because of their status as "mentally retarded" persons.

40. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Section 7 of the Texas Mentally Retarded Persons Act of 1977 in that they are facially invalid and have been applied to deprive mentally retarded persons of the right to live in the least restrictive setting appropriate to their individual needs and abilities.

41. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Article I, § 19, of the Texas Constitution in that they are facially invalid and have been applied irrationally and arbitrarily, without any relation to the public's health, safety, welfare, or morals, so as to prevent mentally retarded persons from living in the Featherston Street group home in the City of Cleburne, Texas.

42. Declare that §§ 8(6) and 16(9) of the City of Cleburne Zoning Ordinance, on their face and as applied, violate Article I, § 3, of the Texas Constitution in that they are facially invalid and have been applied to deprive mentally retarded persons of rights equal to those of other persons similarly situated.

43. Permanently enjoin the defendants from preventing or interfering in any way with CLC establishing and operating and the potential mentally retarded residents living in the home at 201 Featherston Street in Cleburne. This injunction would be based on the rights declared under Paragraphs 38-42, above.

44. Permanently enjoin the defendant City Attorney from prosecuting CLC for its operation and establishment of the Featherston Street group home.

45. On behalf of the plaintiff Cleburne Living Center, Inc., and the potential residents of the Featherston Street group home, permanently enjoin the [R. Vol. I, p. 74]

defendant City of Cleburne (and its officers, agents, employees, and assigns) from obligating, expending, and otherwise making use of any federal funds it receives pursuant to the State and Local Fiscal Assistance Act of 1972 (Public Law No. 92-512), as amended by Public Law Nos. 94-488 and 96-604, 31 U.S.C. § 1221 *et seq.* [hereinafter referred to as the Revenue Sharing Act]. In connection with this permanent injunction, the Court should order the repayment by the City of Cleburne to the federal government to all Revenue Sharing Act funds received by it since July 1, 1980, and should place all present and future payments to the City of Cleburne under the Revenue Sharing Act in escrow until the litigation is closed and the group home is permitted to operate.

46. On behalf of the plaintiff Jan Hannah, order the defendant City of Cleburne to pay her monetary damages equal to the rent she has lost on the Featherston Street home due to the defendant's illegal actions.

47. On behalf of the plaintiff Cleburne Living Center, Inc., order the defendant City of Cleburne to pay CLC monetary damages equal to the lost net profit it has foregone on the operation of the Featherston Street group home due to the defendant's illegal actions.

48. Order such other relief, including costs and attorney's fees pursuant to 42 U.S.C. § 1988 and 31 U.S.C. § 1244(e), as may be just and proper.

(Signature omitted in printing)

[R. Vol. I, p. 76]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CIVIL ACTION

No. CA 3-80-1576-F

CLEBURNE LIVING CENTER, INC., JAN HANNAH, JOHNSON COUNTY ASSOCIATION FOR RETARDED CITIZENS, and ADVOCACY, INC.,

Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, GEORGE W. MARTI, Mayor of the City of Cleburne, Texas; J. T. BASS, ARVAL MARTIN, JR., and ALFRED JOHNS, members of the City Council of the City of Cleburne, Texas; and JIM FERGUSON, City Attorney of the City of Cleburne, Texas

Defendants

DEFENDANTS' FIRST AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now come the City of Cleburne, Texas, George W. Marti, Mayor of the City of Cleburne, Texas, J. T. Bass, Arval Martin, Jr. and Alfred Johns, members of the City Council of the City of Cleburne, Texas, and Jim Ferguson, City Attorney of the City of Cleburne, Texas, defendants in the above styled and numbered cause, and file this their First Amended Original Answer, and for such would show the Court as follows:

1.

Defendants have insufficient information to admit or deny the allegations contained in paragraph 1 of Plaintiffs'

Complaint as to the identification, interest and purposes of the plaintiffs, but the remainder of the allegations in paragraph 1 are denied.

[R. Vol. I, p. 77]

2.

These defendants deny that a cause of action exists of which the Court has jurisdiction as alleged in paragraph 2 of the Complaint and further deny that there is an amount in controversy under 28 U.S.C. §1331, exclusive of interest and costs, which exceeds $10,000.00, as alleged by plaintiffs.

3.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 3 of the Complaint.

4.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 4 of the Complaint.

5.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 5 of the Complaint.

6.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 6 of the Complaint.

7.

The allegations in paragraph 7 of the Complaint are admitted except the allegations with respect to federal funds, and in that connection, the defendants would show that the City of Cleburne has received no federal funds which have been used to pay the costs of exercising the zoning powers of the City of Cleburne.

8.

The allegations in paragraph 8 are admitted except that the Mayor of the City of Cleburne may only vote in the case of a tie and no tie existed in any voting process involving the subject property.

9.

The allegations in paragraph 9 of the Complaint are admitted.

[R. Vol. I, p. 78]

10.

The allegations in paragraph 10 of the Complaint are admitted, except that Jim Ferguson is no longer the City Attorney for the City of Cleburne, Texas.

11.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 11 of the Complaint.

12.

The allegations in paragraph 12 of the Complaint are admitted.

13.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 13 of the Complaint.

14.

The allegations in paragraph 14 of the Complaint are admitted.

15.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 15 of the Complaint.

16.

The defendants have insufficient information to admit or deny the allegations in paragraph 16 of the Complaint, except that they do admit plaintiffs could not start their business until the proper zoning has been granted.

17.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 17 of the Complaint.

[R. Vol. I, p. 79]

18.

The allegations in paragraph 18 of the Complaint are admitted.

19.

The defendants have insufficient information to admit or deny the allegations in paragraph 19 of the Complaint.

20.

The defendants have insufficient information to admit or deny the allegations in paragraph 20 of the Complaint.

21.

The defendants admit that the zoning ordinance of the City of Cleburne contains, among other provisions, the provisions quoted in paragraph 21 of the Complaint. The remainder of the allegations in paragraph 21 are denied.

22.

The defendants have insufficient information to admit or deny the allegations contained in paragraph 22 of the Complaint.

23.

The allegations of paragraph 23 of the Complaint are denied.

24.

The defendants admit that plaintiffs paid the fee required to file their application for the zoning change they requested which is alleged in paragraph 24 of the Complaint.

25.

The defendants admit that the Planning and Zoning Commission voted to recommend that CLC's application for a special use permit be denied on August 18, 1980, at a public hearing, and the presentations in support of and in opposition to the permit were made. The remainder of the allegations in paragraph 25 are denied.

[R. Vol. I, p. 80]

26.

The allegations contained in paragraph 26 of the Complaint are denied.

27.

The allegations in paragraph 27 of the Complaint are admitted except that it is denied that only one person from each side was permitted to speak. In this connection, defendants would show that although they recommend that one person from each side speak, if that person can present the interest of the entire group, no person was denied the right to speak in this hearing and the City has no rule which requires that only one person can speak where it is necessary for more than one to speak in order to fairly present the petitions.

28.

The allegations contained in paragraph 28 of the Complaint are denied.

29.

The allegations contained in paragraph 29 of the Complaint are denied.

30.

The allegations contained in paragraph 30 of the Complaint are denied.

31.

The allegations contained in the first sentence of paragraph 31 are denied. Defendants admit that Section 504 of the Rehabilitation Act of 1973 includes the quoted provisions in the second sentence of paragraph 31. While the defendants admit that the City of Cleburne received federal funds, as alleged in the last sentence of paragraph 31, the defendants deny that the City receives federal funds which are used to finance the exercise of its zoning powers.

[R. Vol. I, p. 81]

32.

The allegations contained in paragraph 32 of the Complaint are denied and in this regard the City specifically denies that any federal funds received pursuant to the Revenue Sharing Act are used to finance the exercise of its zoning power and, it is therefore excepted from a cause of action brought pursuant to 31 U.S.C. 1242 and 1244.

33.

The allegations contained in paragraph 33 of the Complaint are denied.

34.

The allegations contained in paragraph 34 of the Complaint are denied.

35.

The allegations contained in paragraph 35 of the Complaint are denied.

36.

The allegations contained in paragraph 36 of the Complaint are denied.

37.

The allegations contained in paragraph 37 of the Complaint are denied.

38.

The defendants deny that the plaintiffs are entitled to any of the relief requested in their prayer.

39.

The defendants would show that the City Council and the Planning Commission of the City of Cleburne are each legislative bodies and that the members of said bodies at all times pertinent hereto acted with reasonable good faith and, therefore, they are immune to any claim for money damages.

[R. Vol. I, p. 82]

40.

Defendant Jim Ferguson, as alleged by plaintiffs, was the City Attorney of the City of Cleburne and, therefore, is immune to any claim or claims for money damages. The present City Attorney is also immune to any claim for money damages.

41.

The defendants would show that Plaintiff Advocacy, Inc. is federally funded pursuant to the provisions of 42 U.S.C. 6012 for the sole purpose of protecting and advocating the rights of "persons with developmental disabilities". As such, Advocacy, Inc. has no authority to bring an action on behalf of Jan Hannah and the CLC in an action for damages under 42 U.S.C. 1983, since Jan Hannah and the CLC do not qualify as "developmentary disabled persons".

42.

The defendants would show that Jan Hannah and the Cleburne Living Center do not have a cause of action for damages pursuant to the provisions of the Rehabilitation

Act of 1973 (29 U.S.C. 794) or the Revenue Sharing Act (31 U.S.C. 1242) whose remedies are exclusive in nature and do not include damages.

43.

These defendants would show that Plaintiffs Jan Hannah and the Cleburne Living Center have failed to state a cause of action that would entitle them to damages pursuant to the provisions of 42 U.S.C. 1983 or 29 U.S.C. 794, of which this Court has jurisdiction.

44.

These defendants would show that, as prevailing parties in this cause, in accordance with 42 U.S.C. 1988, said defendants, by way of affirmative relief, seek recovery of attorney [R. Vol. I, p. 83] fees in a reasonable amount as part of their costs.

WHEREFORE, these defendants respectfully pray that all relief sought by plaintiffs be denied, that the cause be dismissed and that these defendants be awarded court costs and attorney fees.

(Signature and Certificate of Service omitted in printing)

EXCERPTS FROM THE TRANSCRIPT

(Excerpts from testimony of J. T. Bass, petitioner)

[12] Q. Well, what is mental retardation?

A. I don't know.

Q. Did you know at the time?

[13] A. No.

Q. Did you make any effort to find out?

A. No.

Q. Before your vote?

A. No.

Q. Do you know now?

A. No.

Q. Have you learned any more about mental retardation since your vote?

A. Very little, if any.

* * *

[17] A. No. I took a look at the property before — I went out there, and I didn't think it was adequate for the use it was intended.

Q. What about the property made it inadequate?

[18] A. Well, very little yard space, no recreation facilities. And the fact that it was an old house.

* * *

[28] Q. And insofar as the location is concerned, if it's in a proper location and in a facility that is adequate, you have no objection to it; is that right?

A. No objections.

* * *

(Excerpts from testimony of Alfred Johns, petitioner)

[30] Q. Can you tell me why you voted against it?

A. Several reasons. One was the location I didn't think it was appropriate. Two was because of the petition that had been presented to the Council; three—number three, I didn't think that the property was large enough for it; and number four was because the question that Mr. Bass had asked was not answered.

Q. What question was that?

A. The responsibility for the retarded people that [31] would be there.

Q. What did you take—In your own mind, what did that word "responsibility" mean to you?

A. Who was responsible for the people that would be housed there.

Q. Responsible in what way?

A. Every way.

* * *

[33] A. In my opinion, I didn't think it was in the right location.

Q. What about the location made it inappropriate?

A. In Cleburne, in our zoning, we have zones for separate and different types of buildings and businesses and what not. We try to keep them located separately. One thing, that it was right across the street from the junior high school I didn't think was appropriate.

Q. Why was that a problem?

A. Well, one reason, knowing kids, children are going to be children and they're going to do and say things that I don't think would be appropriate.

Q. Do and say things to who?

A. Well, I'm under the impression we're talking about retarded people.

Q. Are you talking about what the junior high school students would do in regards —

A. I said may do. I didn't say would, I said may do.

* * *

[34] A. As I before mentioned, I don't think the property is large enough to afford recreation for thirteen people or whatever amount that they were going to have.

* * *

[35] Q. You at one time were on the board of directors of the C. C. Cook Developmental Center, I believe it's called?

A. Retardation School.

Q. Is that correct?

A. Yes, I was.

Q. How long were you on that board?

A. Three years.

* * *

Q. Did you meet any of the people that were working [36] there? Any of the mentally retarded people?

A. Any of the mentally retarded people that were working there?

Q. Yes.

A. I met some of the instructors. But they weren't mentally retarded.

Q. You didn't ever meet any of the people that worked there that were being instructed?

A. I can't say that I did. I know some people that attended, but I don't remember meeting any instructors.

Q. Do you know what mental retardation is?

A. Technically speaking, no.

Q. Well, what's your idea of what it is?

A. Technically speaking, I don't — I don't know. I'm not a doctor and I'm not a lawyer.

Q. Well, I'm not speaking technically. I'm asking you what your idea of what mental retardation is?

A. I would rather not guess, because I don't know.

[37] A. I don't think you would use the word "mentally retarded" if they weren't different from you.

Q. Well, what difference do you see?

A. I really don't know. I would say mentally unbalanced or something of that nature. I don't know what it means. I'm not a doctor.

* * *

[38] Q. Mr. Johns, do you recall approximately how many people were going to live — proposed to live in this facility; that is, mentally retarded adults? How many?

A. If I'm not mistaken, it was thirteen.

Q. Plus some staff members?

A. Plus the staff members.

Q. And in connection with city planning and zoning, tell the Court whether or not one of the things that you take into consideration is whether or not people can get to and from their home at all times? Is that important?

[39] A. That definitely is important. The traffic.

Q. In regard to the particular location that was involved in this case, tell the Court whether or not there were any floodplain problems connected with it?

A. There was definitely a — if I'm not mistaken, I believe it was something like five hundred year floodplain in this area.

Q. And in that — that flood that comes every now and then, this facility was located so that the people could not get to or from it?

A. That's true.

Q. And is that an important consideration to you for people who are — who may be mentally retarded?

A. It definitely is, Mr. Luna. That would be a concern to me for the citizens of the City of Cleburne period.

Q. Now, for the purpose of our record, Mr. Johns, you are a black American, are you not, sir?

A. Right, sir.

Q. And would you tell us whether or not in casting this vote you had in mind discriminating against anybody for any purpose?

A. I definitely did not.

• • •

(Excerpts from testimony of Arval Martin, petitioner)

[41] Q. What were the reasons that you voted against it?

A. Well, it would be like these other gentlemen. It was a two hundred feet area that these people were against — the people that lived in the two hundred foot area, they were against it. Then I thought it was the wrong location, also. And the traffic problem. And the yard, it was too small, and close to the school.

Q. All right. What about the location made it inappropriate?

A. Well, because of the elderly people that lived in that area.

* * *

A. They were — they expressed theirself they were against it, and they were concerned about these people might walk around, and scare the people. The older people. Now, this is what has been expressed to me.

* * *

[42] A. Oh, the yard was too small. I didn't think they had enough area for these people to relax in the evenings.

* * *

[43] Q. You said that the traffic was a problem. What about the traffic made it a problem?

A. Well, when school turns out it's — you have, what, three or four hundred students, and their mothers and fathers the majority of the time are picking them up, and you have an awful traffic problem there. And they're bringing them to school, and then they pick them up.

* * *

A. Well, I just didn't want them to accidently get run over or hit by the traffic. The problem of cars, so many of them.

Q. And why did it make a difference to you that the school was nearby?

[44] A. Same reason the other gentlemen said awhile ago, is I was concerned about young people. Like I said in our deposition, that we were all young people one time, and young people say things and do things that they don't really mean to hurt people, but they'll do it sometimes.

* * *

[47] Q. Can you tell the Court what mental retardation is? In your mind what it is?

A. I guess it would be unstable.

* * *

[50] Q. In regard to your own family, tell His Honor whether or not you have any experience with having among your loved ones mentally retarded persons?

A. My daughter, she had a little girl that was — was this way. She died.

Q. And having had that personal experience, Mr. Martin, I would like you to tell His Honor whether you would ever vote against somebody simply because they were mentally retarded?

A. No, sir. I would not.

* * *

[51] Q. Is that right?

A. Yes, sir.

MR. LUNA: Pass the witness.

THE COURT: All right. You may —

MR. HICKS: Excuse me. I just have a couple of questions, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. HICKS:

Q. Mr. Martin, your grandchild that died, that was mentally retarded, how old was the grandchild at the time it died?

A. It was two days old.

Q. So during the time of the child's life you didn't have a chance to learn much about mental retardation, or what the potential for that child —

A. No, sir

Q. —was, did ou?

A. No, sir.

Q. Given what you know about mental retardation, and what you learned from that brief experience, do you see any reason why mentally retarded people shouldn't be able to live in the city together the same way old folks can?

A. I don't see anything wrong with it, but I just [52] don't think that was the location.

* * *

(Excerpts from testimony of David Southern, an officer of respondent Cleburne Living Center)

[59] Q. Did Cleburne Living Center ever choose a specific site for this proposed group home?

A. Yes. The 201 Featherston address.

Q. There in Cleburne?

A. Yes.

Q. When was that site chosen?

A. Approximately July of 1980.

Q. What was the reason for choosing that particular site?

A. Well, it was very accessible to the downtown area, which we felt would be good for the clients who would be living there, since they probably would not be driving vehicles. It also was close to recreational opportunity in the community. The park was not too far, and other things were available within the central business district that we thought would aid the clients in having those things available to them. Also, the size of the home was we felt more than adequate to house the number of residents that we planned to put there.

Q. All along had you planned to put in room for thirteen residents?

[60] A. Well, originally — to break even on a facility of this type, you have to have at least ten or eleven residents. So we planned to open a facility for somewhere between ten and fifteen residents. When we found this particular location, it was, we felt, adequate for thirteen residents, clients.

* * *

[66] Q. How many clients would be residing there?

A. Thirteen.

Q. Okay. What ages would they be?

A. Eighteen and above.

Q. All right. What sex would they be?

A. They would be both male and female.

* * *

[68] Q. Will these people be free to come and go as they wish, or do they have any restrictions on them?

A. Well, of course, that's determined by their intellectual capacity and what the interdisciplinary team, which is the professional and nonprofessionals of the facility, decide that person is capable of. We can't [69] restrict them from activities that they are capable of, but yet if they are uncapable of certain activities, we do have the authority through the interdisciplinary team to restrict them from those activities.

* * *

[71] A. I mean placement in an institution with the State of Texas, and particularly such as a state school. Many clients that come into these facilities have been institutionalized in a state school or have been in a state school for up to ten or twenty years.

Q. Well, where would the people that are the potential residents of this group home be drawn from? Where do they live now?

A. Both from the community and from state schools that are in close proximity. Many of the people who came from the Johnson County area, and the area immediately surrounding it, and who were institutionalized many years ago when these kind of programs were not available, we try to bring back to the community from which — the community area from which they were put in the institution.

Also, there are many parents who because of advancing age feel that they're no longer in the position to care for their mentally retarded children, and they place them in this kind of program also.

* * *

[72] Q. Is there — You were mentioning earlier the institutionalization of some of the people that would be living there. Are there any state institutions nearby? Near Cleburne?

A. Yes. I think the two closest are Fort Worth State School and Mexia State School. I think Mexia is about sixty miles or so from Cleburne, and Fort Worth is probably forty-five miles or forty miles.

Q. So there's a possibility that several of the residents at the proposed facility would come from those two institutions?

A. Yes. Uh-huh.

* * *

[86] Q. Okay. In your presentation to the city council, what did you tell them?

A. Well, basically, I explained — there were several issues at the planning and zoning commission meeting that had been brought up that were really not relevant to the situation. Such as the possible flooding, the traffic problems, and the size and use of the house. And I first, you know, told them that those things were not relevant, and had documentation to the effect of why they were not relevant.

* * *

[108] A. You could admit anyone with between a thirty-five and sixty-nine IQ, that's correct. Well, thirty-six. Over thirty-five, which would be thirty-six IQ.

* * *

[109] Q. Well, as you planned it, people that would be there, would there be included in the group people who would both be able to distinguish right from wrong as to their conduct on the street, as well as people who would not be able to distinguish right from wrong?

A. Well, we — it would depend on your admission criteria. Of course, each facility is required to have an admission

criteria before, you know, you take clients into [110] your particular facility. Generally speaking, people with that IQ are able to distinguish the difference between right and wrong per se. That's not to say that they don't have some social behaviors that wouldn't be looked upon as a little peculiar. They might have. But —

Q. Such as aggressiveness?

A. No, no.

Q. You have never seen —

A. There are some people with thirty-six IQ, as there are some people with a hundred and thirty-six IQ, who are aggressive, that's true. But we would not take those clients. Because in a community type placement you don't take that — that kind of behavior. That's really what the state schools are for.

Q. Well, do you have a list of criteria of what you would and would not take?

A. Well, the admission criteria that we have for our facility in Keene will be the same admission criteria that we would use in the facility in Cleburne.

* * *

[111] Q. Does it have any provision in it that you will not accept people who's — who do not know right from wrong?

A. I don't think it states that specifically, no.

* * *

Q. Well, are any of your — have you ever had a situation where any of your people at Keene, for example, would destroy property of others?

A. No.

* * *

A. We did have one client at Keene for a brief period of time who took some mail out of a mailbox, and — but he later returned it.

* * *

[112] Q. Now, how do you restrict them? Did you plan to keep the doors locked?

A. No. From the — Well, they're locked to the outside, not to the inside.

Q. So, then, people from the inside have no barrier to keep them from leaving at any time during the night, if they choose to do so?

* * *

[128] Q. (MR. LUNA) Oh, by the way, these few regulations that you have told us that were adopted, I believe you said last November?

A. I believe that's correct.

Q. One of the things that those regulations specifically require, is it not, sir, that the proposed facility must be located in an incorporated city, which is subject to special use permit requirements, local zoning and/or occupancy code requirements, and must be noncontiguous to an already existing facility?

* * *

[129] Q. And the — those requirements also required that requests for certification will be limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility, did it not?

A. It did.

Q. So the facility that you have, that you're requesting at Cleburne, instead of putting six beds, you wanted to put thirteen?

A. That's correct.

* * *

Q. Mr. Southern, do you know whether you, Cleburne Living Center, will be subject to the requirements that Mr. Luna was just discussing with you?

[130] A. Yes. We —

Q. If and when Cleburne Living Center gets to open the 201 Featherston Street property?

A. Yes. We will not be subject to the requirement for six beds.

Q. How do you know that?

A. We have a letter from Marlin Johnston, who's the Commissioner of the Texas Department of Human Resources, indicating that — that we will be exempt from that, because of the fact that we have done all that was necessary prior to that, and that we don't have to do that at this time.

* * *

[131] Q. (MR. HICKS) If, in fact, Cleburne Living Center is ultimately permitted to operate at 201 Featherston as a Level I Intermediate Care Facility for Mentally Retarded persons, do you have any intention of so operating?

A. Yes, we do.

* * *

(Excerpts from testimony of Dr. Philip Roos)

[137] Q. (MR. HICKS) Dr. Roos, what is mental retardation?

A. Essentially, mental retardation is a problem of learning. It is manifested particularly in difficulty with abstract

thinking, judgment and problem solving and retention, [138] but also includes social adjustment and economic productivity.

Q. How do you decide if a person is mentally retarded?

A. We use basically three criteria: Measured intelligence, adaptive behavior and medical classification.

Q. How are these determined? Are they measurable?

A. Measured intelligence is measured by using a standard test of intelligence, traditionally yields an IQ or intelligence quotient. Adaptive behavior can be measured using such an instrument as the violent social maturity scale, and it can leave a measure of social adaptability, the so-called social quotient. The medical classification is determined on the basis of medical and biomedical evaluations. In assessing an individual as mentally retarded, the typical approach is to use a number of disciplines working together.

• • •

Q. Is mental retardation a type of a mental illness?

A. No, sir. It's an entirely different condition, requiring entirely different approaches.

Q. Well, how do they differ?

A. Mental retardation is a problem of a deficit in [139] intellectual development and social adaptation. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally, it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.

Mental illness, on the other hand, is a disorder of thinking, of emotions and of behavior. It can occur any time in life, often after a period of normal development. It is primarily a psychiatric, rather than an educational problem, and often it is reversible. That is, it is potentially curable in many cases.

• • •

[140] Q. Are there different degrees or levels of mental retardation?

A. Very definitely. There is a wide variability among retarded individuals. The mildest level of mental retardation, referred to as mild mental retardation, these are individuals who's intelligence is roughly between an IQ of 50 and an IQ of 70. This includes approximately eighty-nine percent of all mentally retarded people. Roughly nine out of ten mentally retarded people are mildly retarded.

Moderate mental retardation, IQ's of roughly 35 to 50, include six percent of the population. Severe mental retardation, IQ's 20 to 35, profound retardation, IQ below 20, these two categories combined include only about five percent of the population.

Q. What might be expected from persons falling in the mild to moderate categories of mental retardation?

A. It depends a great deal on the educational opportunities and the opportunities for prevocational and vocational training. Given such opportunities, the vast majority of these individuals can become self-sufficient, economically productive members of society. Most of these people live in communities with the rest of us, and, in point of fact, most become invisible after they leave school.

Q. How might one identify a mildly retarded person on casual contact, such as a street encounter or in the checkout [141] line at a supermarket?

A. In the vast majority of cases it would be impossible to do so on an informal contact.

Q. How common is mental retardation?

A. Mental retardation, unfortunately, is one of the most common conditions handicapping human beings in our society today. The incidence of mental retardation is

approximately three percent. That means that roughly a hundred and twenty-five thousand babies are born each year who will be mentally retarded. That's about one every five minutes. We estimate that there are some six and-a-half million citizens in the United States who will be mentally retarded at some time in their life.

• • •

Q. Has mental retardation always been such a major problem?

A. It was less of a handicap in less complex societies. Mildly retarded people were generally not identified. The severely retarded individual, however, has always been recognized, and in the past has often been ridiculed, punished, segregated and so forth.

• • •

[142] Q. What happened in 1950?

A. A number of things. A presidential panel on mental retardation was established, which later became the President's Committee on Retardation, which became a strong and viable advocate for retarded persons at the national level. Our own association, the Association for Retarded Citizens, was founded in 1950, and became a very strong consumer advocate voice in the nation. A new philosophy began to permeate the field of mental retardation and other disabilities; consumerism became an important force.

• • •

[144] Q. (MR. HICKS) Well, has the public a good understanding of mental retardation today?

A. It has improved in the last few years. This has been due in part to media coverage, and to the picturing of mentally retarded people through the media as real, genuine human beings.

Q. What would be a more accurate picture of mentally retarded?

A. In point of fact, they are genuine human beings. [145] And it's unfortunate that this is a relatively recent image which has emerged. They're unique people. They have the same needs and the same rights as the rest of humanity. Perhaps there's more obstacles to overcome than some of us.

• • •

[152] Q. You have just used the word "normal". Are you suggesting that treating retarded people normally will make [153] them normal?

A. No, sir, I'm not. I am saying that by treating them as normally as possible, this will enhance their capacities to learn, grow and develop, and to approximate to the greatest extent possible the normative behavior that we find in society today.

• • •

[154] Q. Have you ever heard of the principle of individualization?

A. Yes.

Q. Briefly, what is that principle?

A. That is the concept that we approach each retarded person as a unique individual, and that we design programs and services which will best meet his individual needs.

• • •

[156] Q. What is the relationship, if any, between the appropriateness and viability of a group home for mentally retarded adults and the presence nearby of a public junior high school?

[157] A. I see no relationship.

• • •

Q. Dr. Roos, for purposes of this question, will you assume that the following list of uses are permitted uses in a particular district in a city zoning?

A. Okay.

Q. Apartment houses, boarding houses, fraternity houses, dormitories, apartment hotels, eleemosynary [158] institutions, other than penal institutions, and hospitals, sanatariums, nursing homes or homes for convalescent or aged people, except hospitals or group homes for mentally retarded people. Okay?

And assume that a hospital for mentally retarded people, or a group home for mentally retarded people, cannot operate without a special permit.

Do you see any basis for that different treatment?

A. I do not.

* * *

[159] Q. Yes, sir. But you would agree that — with the requirements that the State of Texas published on or about December 22, 1981, wherein they said that all future applications should be for homes in this class of not more than six people, wouldn't you?

A. Would I agree with that?

Q. Yes, sir.

[160] Is that your question?

Q. Yes, sir.

A. As an expert in mental retardation, I would not agree with that.

* * *

[162] Q. Now, in view of the finding that — by the State of Texas and the publishing of the regulations which say that no more than six will be included in new applications [163] beginning May 1, 1982; in view of that, you would

assume that if there is reasonable data to back that up, it therefore would not be unreasonable for a city council to decline to approve a special use permit that would have as many as thirteen?

A. If there are validating data to substantiate the basis of that, I would say there is a reasonable basis for it.

* * *

[165] Q. Have you known mentally retarded people with an IQ of between thirty-five and forty who would not know that it was wrong to go take somebody else's mail out of the mailbox?

A. Yeah.

Q. Have you known mentally retarded persons with an IQ of between thirty-five and forty who would not know that it would be wrong to destroy other property of elderly people who live in the immediate neighborhood?

A. Yeah. Uh-huh.

* * *

[168] Q. Dr. Roos, the defendant's attorney was questioning [169] you earlier about some state regulations talking about beds with six — ICF-MR's with beds for six or less. You don't know, do you, whether the basis for that regulation was any study of the needs of mentally retarded people, or fiscal considerations of the state or something else?

A. I do not know, sir.

* * *

(Excerpts from testimony of Jerry Walker)

[303] Q. And after May 1, 1982, if a Level I, V or VI facility has — is designed and intends to keep more than six people, will it be able to be certified?

A. No, sir.

Q. And those rules are provided to present criteria for greater assurance that facilities will be a normal residence, with access to programmatic resources, and that the facilities will be well integrated into the local community, and that the facilties will meet a service need in coordination with other mental retardation development disability services providers, are they not, sir?

A. Yes, sir.

Q. And these outcomes are of benefit to both the developmentally disabled client, client consumers, and the communities in which the facilities are to be located, are they not?

A. I believe that says that, yes.

Q. Now I would like for you to look over in the right-hand column, under 2(a), and tell the Court whether or not after May 1 a facility may be located in a city which does not have the facilities of a special use permit requirement, local zoning and/or code requirements?

[304] A. No, sir, they have to meet that requirement.

Q. All right, sir.

MR. LUNA: If it please the Court, we offer Defendant's Exhibit 10 in evidence.

THE COURT: Is there objection?

MR. HICKS: I haven't seen it, Your Honor. I have no objection, Your Honor.

THE COURT: Defendant's 10 is admitted.

* * *

[306] Q. Mr. Walker, the rules that were just referred to in Defendant's Exhibit Number 10, you participated in the drafting of those rules, didn't you?

A. Yes.

Q. Were they promulgated for fiscal reasons?

A. Yes, they were.

* * *

(Excerpts from testimony of Robert Miller, former employee of City of Cleburne)

[344] Q. (MR. LUNA) Would you tell the Court whether there are — whether or not there are other areas that in your opinion would be appropriate in the City of Cleburne?

A. Yes, I — I think that there are other areas which would be more appropriate within the City of Cleburne. What would be required first, should the proper location be found, that the property be rezoned or should be found to be R-3 zoning, which is what these types of facilities are required to be operated under.

I know specifically of a location within the City of Cleburne, which I believe was looked at, which would have been perhaps a more proper facility for this.

Q. Where is that location?

A. It is — and I don't recall the exact name of the street, but it's a block or two from the hospital.

Q. Near doctor's offices?

A. Johnson County Memorial Hospital, as well as doctor's offices.

[345] Q. Tell us whether or not it's on a main street, such as Featherston, or an off street with less traffic.

A. It is on an off street with less traffic.

Q. And does that — that's one facility that these very — these very operators looked at?

A. It's my understanding, yes.

* * *

[346] A. This is a tax roll card for the City of Cleburne.

* * *

[347] Q. And is it a true and correct photocopy of the original instrument which is on file in — as one of the records in the Tax Office, City of Cleburne?

A. Yes, it is.

Q. Does it show the size of the house involved here?

A. I believe it does. On page 2 it indicates that the structure type, which is a residence, consists of two thousand five hundred ten square feet.

* * *

Q. (MR. LUNA) Directing your attention to the zoning ordinance, I would like for you to tell the Court whether or not there's anything in that ordinance, or any other ordinance that you know of in the City of Cleburne, that prohibits mentally retarded people from living in that city?

A. There is nothing, no.

* * *

[349] Q. Well, what else about the house makes it more appropriate for a person that's mentally retarded to live there?

A. Well, for the number of people that were going to be housed, it was a much larger facility?

* * *

[351] Q. Are you aware that that particular property that you referred to would not meet state standards for intermediate care facilities for the mentally retarded for Level I?

A. No, I'm not.

Q. Did you bother to check?

A. No.

• • •

(Excerpts from testimony of Jan Hannah, respondent and an officer of Cleburne Living Center, Inc.)

[367] Q. Mrs. Hannah, are you familiar with the property on Nelson Street that Mr. Miller was referring to earlier in his testimony?

A. You're speaking of what is commonly referred to as the old Nelson Nursing Home in Cleburne?

Q. I do not know what it's called.

A. I believe that's the property he was referring to. Yes, I'm very familiar with it.

Q. Did you ever engage in negotiations about the purchase of the house?

A. Yes, we did.

Q. And what was the result of those negotiations?

A. We could not come to terms with the owner.

• • •

[368] Q. So you figured that the overall cost, by the time you got the repairs made to get it to comply, would cut down the profit that you would have after leasing the other house?

A. It would not have cut down on the profit, it would have been — we would have been unable to have carried the burden of the cost.

• • •

(Excerpts of testimony of David Southern)

[369] Q. Mr. Southern, are you familiar with the property in Cleburne on Nelson Street, to which Jan Hannah and Robert Miller have been referring in testimony?

A. Yes.

* * *

Q. Would it meet state intermediate care facility for [370] mentally retarded Level I standards?

A. No.

* * *

Q. And the state people didn't tell you that the other piece of property could not be made to comply by proper repairs, did they?

A. They indicated to me that it would never be appropriate for a group home for mentally retarded.

* * *

Excerpts from Plaintiffs' Exhibit No. 1.

APPENDIX A

ZONING ORDINANCE*

AN ORDINANCE TO REGULATE AND RESTRICT THE HEIGHT, NUMBER OF STORIES, AND SIZE OF BUILDINGS, AND OTHER STRUCTURES, THE PERCENTAGE OF LOT THAT MAY BE OCCUPIED, THE SIZE OF THE YARDS, COURTS AND OTHER OPEN SPACES, THE DENSITY OF POPULATION, AND THE LOCATION AND USE OF BUILDINGS, STRUCTURES, AND LAND FOR TRADE, INDUSTRY, RESIDENCE, OR OTHER PURPOSES; AND IN THE CASE OF DESIGNATED PLACES AND AREAS OF HISTORIC AND CULTURAL IMPORTANCE, TO REGULATE AND RESTRICT THE CONSTRUCTION, ALTERATION, RECONSTRUCTION, OR RAZING OF BUILDINGS AND OTHER STRUCTURES; TO DIVIDE THE MUNICIPALITY INTO DISTRICTS AND ESTABLISH, BY REFERENCE TO A MAP, THE BOUNDARIES OF SAID DISTRICTS FOR SAID PURPOSES; TO PROVIDE FOR OFF-STREET PARKING

---

*Editor's note — The zoning ordinance is printed herein as adopted June 8, 1965. The original arrangement, section numbers, catchlines and headings have been retained. Zoning map amendments and ordinances zoning or rezoning specific property are not included herein, but are on file in the city clerk's office.

Charter reference — Authority of council relative to zoning, § 5.

Cross references — Planning and zoning commission, § 2-63 et seq.; city-county joint airport zoning board, §§ 3-1, 3-2; keeping of bees prohibited in certain residential areas, § 5-1; buildings and general building regulations, ch. 6; streets and sidewalks, ch. 25; building lines for business structures on certain streets, § 6-2; subdivision regulations, App. B.

State law reference — Zoning regulations, Vernon's Ann. Civ. St. art. 1011a et seq., 1175(26).

AND LOADING; TO PROVIDE FOR DEFINITIONS; TO PROVIDE FOR ITS INTERPRETATION AND AMENDMENTS HERETO; TO PROVIDE FOR ITS ENFORCEMENT AND PROVIDING PENALTIES FOR VIOLATION OF ITS PROVISION; TO PROVIDE FOR A BOARD OF ADJUSTMENT AND DEFINING ITS POWERS AND DUTIES; TO PROVIDE FOR PERMITS; TO PROVIDE FOR INVALIDITY OF A PART; AND FOR REPEAL OF ALL ORDINANCES OR PARTS THEREOF IN CONFLICT WITH THIS ORDINANCE.

1153

FOR THE PURPOSE OF PROMOTING HEALTH, SAFETY, MORALS, AND THE GENERAL WELFARE OF THE COMMUNITY, THE GOVERNING BODY OF CLEBURNE DEEMS IT NECESSARY TO ADOPT THE REGULATIONS MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN AND DESIGNED TO LESSEN CONGESTION IN THE STREETS; TO SECURE SAFETY FROM FIRE, PANIC AND OTHER DANGERS; TO PROMOTE HEALTH AND THE GENERAL WELFARE; TO PROVIDE ADEQUATE LIGHT AND AIR; TO PREVENT THE OVERCROWDING OF LAND; TO AVOID UNDUE CONCENTRATION OF POPULATION; TO FACILITATE THE ADEQUATE PROVISION OF TRANSPORTATION, WATER, SEWERAGE, SCHOOLS, PARKS, AND OTHER PUBLIC REQUIREMENTS. NOW THEREFORE BE IT ORDAINED BY THE GOVERNING BODY OF CLEBURNE, TEXAS.

1154

* * *

Section 2. Short title.

These regulations shall be known and may be cited as the Zoning Ordinance of Cleburne, Texas.

1161

Section 3. Districts.

For the purpose of regulating and restricting the use of land and the erection, construction, reconstruction, alteration, moving or use of buildings, structures or land, all lands within the corporate limits of Cleburne are hereby divided into fourteen (14) districts with their respective rank from more to less restrictive classification as follows:

District R-1.	Single-Family Dwelling District.
District R-2.	Two-Family Dwelling District
District R-T.	Townhouse District.
District R-3.	Apartment House District.
District C-MW.	Miniwarehouse District.
District C-O.	Nonretail District.
District C-1.	Local Business District.
District C-2.	General Business District.
District C-3.	Commercial District.
District C-4.	Private Clubs, etc.
District C-P.	Planned Business District.
District M-1.	Light Industrial District.
District M-2.	Heavy Industrial District.
District MH.	Mobile Home District.

Any use not listed herein may be placed in a suitable district classification by the Governing Body, after recommendation of the Planning and Zoning Commission. (Ord. of 11-9-71; Ord. No. 7-1976-32, § 1, 7-26-76; Ord. No. 4-1977-11, § 1, 4-12-77; Ord. No. 6-1978-23, § 1, 6-13-78)

Section 4. District map adopted

Boundaries of the districts, as enumerated in Section 3 of this Ordinance, are hereby established as shown on a map

prepared for that purpose, which map is hereby designated as the Zoning District Map; and said map and all the notations, references and information shown thereon is hereby made as much a part of this Ordinance as if the same were set forth in full herein. The City Planning Commission shall keep on file in its office an authentic copy of said map, and all changes, amendments or additions thereto.

1162

When definite distances in feet are not shown on the Zoning District Map, the district boundaries are intended to be along existing street, alley or platted lot lines, or extensions of the same, and if the exact location of such lines is not clear, it shall be determined by the Building Inspector, due consideration being given to location as indicated by the scale of the Zoning District Map.

When streets or alleys on the ground differ from the streets or alleys as shown on the Zoning District Map, the Building Inspector may apply the district designations on the map to the streets or alleys on the ground in such a manner as to conform to the intent and purpose of this Ordinance.

Whenever any street or alley is vacated, the particular district in which the adjacent property lies shall be automatically extended to the center line of any such street or alley. Whenever a street or alley is dedicated, the zoning district within the area dedicated shall be void.

1162.1

Section 5. Requirements must be observed.

Except as hereinafter specifically provided:

1. No building or structure shall be erected, constructed, reconstructed, moved or altered, nor shall any building, structure or land be used for any purpose other than is permitted in the district in which such building, structure, or land is situated.
2. No building or structure shall be erected, constructed, reconstructed, moved or altered, to exceed the height

or area limit or the yard or parking requirement herein established for the district in which such building or structure is located.

3. No lot area shall be reduced or diminished so that the yards or other open spaces shall be smaller than prescribed by these requirements, nor shall the density of population be increased in any manner, except in conformity with the area regulations established herein.
4. Every building hereafter erected or altered shall be located on a lot as herein defined and in no case shall there be more than one main building on one lot except as provided herein.

Section 6. District R-1. Single-family dwelling district.

USE REGULATIONS

In District R-1 no building, structure, land or premises shall be used and no building or structure shall be hereafter erected, constructed, reconstructed, moved, or altered, except for one or more of the following uses: (For exceptions see Section 16, Special Use Permits; and Section 17, Nonconforming Uses.)

1. Dwellings, one family.
2. Churches, and publicly owned and operated community buildings, public museums, public libraries.
3. Public parks and playgrounds, including public recreation or service buildings and swimming pools within such parks, public administrative buildings, police and fire stations.

4. Public schools, elementary and high, and private schools with curriculum equivalent to that of a public elementary or high school, and institutions of higher learning, including stadium and dormitories in conjunction, if located on the campus.
5. Golf courses and clubhouses appurtenant thereto, (except miniature golf courses, driving ranges and other

similar activities operated as a business), provided no clubhouse, swimming pool, or parking area shall be closer than one hundred (100) feet to a property line.

6. Railroad right-of-ways, not including railroad yards.
7. Agriculture.
8. Nurseries, and truck gardens limited to the propagation, cultivation and sale of plants; provided that no obnoxious fertilizer is stored upon the premises, and no obnoxious soil or fertilizer renovation is conducted thereon. Greenhouses may be constructed by Special Use Permit.
9. Accessory uses, customarily incident to the above uses and located on the same lot therewith, not involving the conduct of a business or industry. No equipment, material or vehicle other than motor passenger cars shall be stored in any residential district.

a. Automobile parking areas which are necessary to the uses permitted in this district.

b. The term "accesory use" shall include customary home occupations, such as the office of physician, dentist, surgeon, dressmaker, musician, or artist under the following restrictions:

(1) That such uses are located in the dwelling used by a person as his or her private residence.

(2) That no assistant or other than a member of the family household is employed, and no window display or sign, either illuminated or more than one (1) square foot in area is used to advertise the same.

(3) That no power other than electric and of not more than one-half horse power is used in any one machine, and not more than one horse power total is used in such home occupation.

1164

c. For any dwelling house there shall be permitted one private garage or covered carport, with space for not more

than one vehicle for each two thousand (2,000) square feet of lot area, or servant's quarters, provided that such garage or servant's quarters shall be located not less than sixty (60) feet from the front lot line, nor less than three (3) feet from any side lot line, nor less than one (1) foot from any alley line, except that when the rear lot line is common to a side or rear lot line of another lot, such outbuilding must be located at a minimum of three (3) feet from said rear lot line, and in the case of corner lots not less than the distance required for residences from side streets, and further provided that such servant's quarters shall be occupied only by servants employed on the premises. If both garage and servant's quarters are detached, they shall be combined in one building. A garage may be constructed across a common lot line by mutual agreement between property owners. A garage or servant's quarters constructed as an integral part of the main building shall be subject to the regulations affecting the main building, except that on a corner lot, a private garage, when attached to the main building and not exceeding the height of the main building, may extend into the required rear yard to a point not less than eighteen (18) feet from the rear lot line, and shall not occupy more than thirty (30) per cent of the required rear yard. No part of a detached accessory building shall be closer than ten (10) feet to the main building.

d. A private stable will be permitted on a lot having an area of more than twenty thousand (20,000) square feet, provided that it is located not less than fifty (50) feet from any property line. On such lots there shall not be kept more than one horse or pony for each ten thousand (10,000) square feet of lot area, or one cow for each twenty thousand (20,000) square feet of lot area. Twenty-five (25) fowl or rabbits shall be permitted for each twenty thousand (20,000) square feet of lot area. No such fowl or rabbits shall be housed nearer than fifty (50) feet to a property line.

e. Temporary real estate sales office, located on property being sold, and limited to period of sale, but not exceeding two years without Special Use Permit.

f. A hobby shop may be operated as an accessory use by the occupant of the premises purely for personal enjoyment, amusement or recreation; provided such use shall not be obnoxious or offensive by reason of vibration, noise, odor, dust, smoke or fumes or electrical interferences.

g. Signs as provided in Section 21.

h. A driveway or walk, as distinct from a dedicated street, to provide access to premises in a District C-1 to M-2 inclusive shall not be permitted in a District R-1 to R-3 inclusive.

HEIGHT AND AREA REGULATIONS

In District R-1, the height of buildings, the minimum dimensions of lots and yards, and the minimum lot area per family permitted on any lot, shall as follows: (For exceptions see Section 18, Height and Area Exceptions).

Height: Buildings or structures shall not exceed thirty-five (35) feet, and shall not exceed two and one-half (2½) stories in height.

Front yards: Any building hereafter constructed shall provide for a front yard, the minimum depth of which shall be at least thirty (30) feet.

Side yards: There shall be a side yard on each side of a building not less than ten (10) per cent of the width of the lot; except that such side yard shall not be less than seven (7) feet, and need not be more than fifteen (15) feet.

Buildings on corner lots shall provide a side yard on the street side of not less than fifteen (15) feet, provided this regulation shall not be so interpreted as to reduce the buildable width of a corner lot in separate ownership at the time of the passage of this Ordinance to less than thirty-five (35) feet.

Rear yards: The depth of the rear yard shall be at least twenty (20) feet.

Lot area per family: Every dwelling hereafter erected, moved, or altered shall provide a lot area of not less than seven thousand (7,000) square feet per family, provided that [1166] where a lot has less area than herein required in separate ownership at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling. Where a public or community sewer is not available and in use for the disposal of all sanitary sewage, each lot shall provide not less than fifteen thousand (15,000) square feet per family.

Lot width: The minimum width of a lot shall be sixty (60) feet, provided that where a lot has less width than herein required in separate ownership at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling.

Minimum dwelling size: Six hundred fifty (650) square feet of living floor area per family.

Parking regulations: (See Section 20, Off-Street Parking and Loading). (Ord. No. 12-1976-60, § 1, 12-14-76)

Section 7. District R-2. Two-family dwelling district.

USE REGULATIONS

In District R-2 no building, structure, land or premises shall be used, and no building or structure shall be hereafter erected, constructed, reconstructed, moved, or altered, except for one or more of the following uses: (For exceptions see Section 16, Special Use Permits; and Section 17, Nonconforming Uses).

1. Any use permitted in District R-1.
2. Dwellings, two-family.
3. Accessory uses as provided in District R-1, except that in District R-2 a private garage or carport may provide space for not more than one motor vehicle for each fifteen hundred (1500) square feet of lot area.
4. Signs as provided in Section 21.

HEIGHT AND AREA REGULATIONS

In District R-2 the height of buildings, the minimum dimensions of lots and yards and the minimum lot area per

1167

family permitted on any lot shall be as follows: (For exceptions see Section 18, Height and Area Exceptions).

Height: Same as District R-1.

Front yards: Same as District R-1.

Side yards: Same as District R-1, including regulations for corner lots.

Rear yards: Same as District R-1.

Lot area per family: Every dwelling hereafter erected, moved, or altered shall provide a lot area of not less than seven thousand (7,000) square feet per family for one-family dwellings, or thirty-five hundred (3,500) square feet per family for two-family dwellings, provided that where a lot has less area than herein required, in separate ownership, at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling. Where a public or community sewer is not available and in use for the disposal of all sanitary sewage, each lot shall provide not less than fifteen thousand (15,000) square feet per family.

Lot width: Same as District R-1.

Minimum dwelling size: Same as District R-1 for one-family dwellings. No minimum for other dwellings.

Parking regulations: (See Section 20, Off-Street Parking and Loading).

Section 7.1. District R-T. Townhouses.

USE REGULATIONS

In District R-T, no buildings, structures, land or premises shall be used, and no building or structure shall be hereafter

erected, constructed, reconstructed, moved or altered, except for one or more of the following uses:

1. Any use permitted in District R-2.
2. Townhouses, rowhouses or other dwellings with common walls.

1168

3. Accessory buildings and uses.

HEIGHT AND AREA REGULATIONS

In District R-T the height of buildings, the minimum dimensions of lots and yards and the minimum lot size per townhouse shall be as follows:

Height: There shall be no height limitation on buildings or structures in this district, except when the same are within two hundred (200) feet of an R-1 or R-2 District, in which case the maximum height thereof shall be thirty-five (35) feet.

Setback: Yard setbacks and building lines shall be not less than the following:

(1) Buildings adjacent to public streets which are internal to the townhouse development shall [be] set back not less than thirty (30) feet from the right-of-way lines of said streets.

(2) Buildings containing dwelling units fronting on a place or court and facing other such buildings shall be separated from said buildings by not less than sixty (60) feet of open space.

(3) Buildings adjacent to major thoroughfares, collector streets, or other public streets which are not internal to the townhouse development shall be set back not less than thirty (30) feet from the right-of-way of such streets.

(4) Buildings adjacent to property which is not a part of the townhouse development shall be set back as follows:

(a) If the front or rear (i.e. that side of the building which contains primary exits or entrances) of the building faces such property, the building shall be set back not less than twenty (20) feet from the property line.

(b) If the side of the building faces such property, the building shall be set back not less than ten (10) feet from the property line.

1168.1

(5) When a building lot in this district abuts any residential lot in a more restrictive district, the minimum setback requirements of the building adjacent to such residential lot shall be increased an additional five (5) feet.

LOT SIZES

The minimum width for platted townhouses shall be:

(1) Interior lots: Twenty (20) feet

(2) End lots not on a corner: Twenty-five (25) feet

(3) Corner lots: Thirty-five (35) feet.

PARKING REGULATIONS

See Section 20, Off-Street Parking and Loading. (Ord. No. 6-1978-23, § 2, 6-13-78)

Section 8. District R-3. Apartment house district.

USE REGULATIONS

In District R-3, no building, structure, land or premises shall be used, and no building or structure shall be hereafter erected, constructed, reconstructed, moved or altered, except for one or more of the following uses (For exceptions see Section 16, Special Use Permits; and Section 17, Nonconforming Uses.):

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.

3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels

1168.2

6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
8. Philanthropic or eleemosynary institutions, other than penal institutions.
9. Accessory uses customarily incident to any of the above uses, and located on the same lot, not involving the conduct of a business or industry.
   a. There shall be permitted such facilities as are customarily accessory to the operation of an apartment hotel when conducted and entered from within the building.
   b. Private or storage garages, located as provided in District R-1 for private garages, may provide space for not more than one motor vehicle for each seven hundred and fifty (750) square feet of lot area. No business occupation or service connected with motor vehicles, except washing occupant autos shall be permitted.
10. Signs as provided in Section 21.

HEIGHT AND AREA REGULATIONS

In District R-3 the height of buildings, the minimum dimensions of lots and yards and the minimum lot area per family permitted on any lot shall be as follows: (For exceptions see Section 18, Height and Area Exceptions.)

Height: Buildings or structures shall not exceed forty-five (45) feet or three (3) stories in height. Except that a building may be erected to a greater height if setbacks from all

required yard lines are increased one foot for each two (2) feet of additional height above forty-five (45) feet.

Front yards: Same as District R-1, including regulations for corner lots.

Rear yards: Same as District R-1.

1169

Lot area per family: Every building or portion of a building hereafter erected, moved or altered shall provide a lot area for one- and two-family dwellings, the same as in District R-2. The minimum lot area for multiple family dwellings shall be fifteen hundred (1500) square feet per family; provided that where a lot has less area than herein required in single ownership, at the time of the passage of this Ordinance, this regulation shall not prohibit the erection of a one-family dwelling. Where a public or community sewer is not available and in use for the disposal of all sanitary sewage, each lot shall provide not less than fifteen thousand (15,000) square feet per family.

Lot width: Same as District R-1.

Minimum dwelling size: Same as District R-2.

Parking regulations: (See Section 20, Off-Street Parking and Loading.)

• • •

1170

Section 16. Special use permits.

Any of the following uses may be located in any district by Special Use Permit of the Governing Body, after public hearing, and after recommendation of the Planning Commission, under such conditions as to operation, site development, parking signs, and time limit as may be deemed necessary in order that such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purposes of this Ordinance. Such uses shall comply with the height and area regulations of the district in which they may be located, except that radio, television and microwave towers, and drive-in theater screens may exceed said height regulations.

To better facilitate supervision of the special use permits, a limitation of one year is applicable to each such permit issued.

Within thirty (30) days from the anniversary date the special use permit is granted, the property owner shall file

an affidavit with the city secretary verifying that the property is still being used for the purpose granted by the special use permit, and will be submitted by the city secretary for council approval or disapproval. Failure to file the said affidavit shall automatically cancel permit.

Each applicant shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used for the following purposes under the special use permit:

1. Amusement parks, commercial baseball or athletic fields, race tracks, circuses, carnivals or fairgrounds.
2. Aviation fields or airports, under such restrictions as the Governing Body, after report from the Planning Commission, may impose on land, buildings or structures within an approach or transition plane or turning zone to promote safety of navigation and prevent undue danger from confusing lights, electrical interference or other hazards.
3. Telephone exchange buildings.
4. Nursery schools.
5. Cemeteries, mausoleums, or crematories for the disposal of the human dead.
6. Drive-in theaters.
7. Golf driving ranges, commercial or illuminated.
8. Gun clubs, skeet shoots or target ranges.
9. Hospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions.

10. Picnic groves and fishing lakes, including minor and incidental concession facilities for patrons only.
11. Mines or quarries, including the removing, screening, crushing, washing or storage of ore, sand, clay, stone, gravel or similar materials; provided, however, that no Special Use Permit shall be issued until and unless

1190.2

the locations, site plan, and method of operation, including necessary structures, have been submitted to and approved in writing by the Governing Body after report from the Planning Commission, which permit shall be for a limited period of time not to exceed five (5) years.

12. Nursery sales office, building or greenhouse (wholesale or retail).
13. Radio, television and microware towers.
14. Refuse dumps.

1190.3

15. Reservoirs, wells, towers, filter beds, or water supply plants.
16. Riding stables and tracks.
17. Sewage, refuse, garbage disposal plants or sanitary fills.
18. Swimming pools, commercial.
19. Trailer courts, subject to the following regulations:
    a. Each trailer lot shall be not less than fifty (50) by seventy-five (75) feet in size and three thousand seven hundred and fifty (3,750) square feet in area.
    b. Each trailer lot shall have connections to a sanitary sewerage system or spetic tank to be approved by the City Engineer, and to a pure and safe water supply.
    c. The minimum distance between trailers shall be twenty-five (25) feet, and no trailer shall be

located closer than thirty (30) feet to a court property line.

d. At least one hundred (100) square feet of playground area shall be provided for each trailer lot, other than the area of the trailer lot itself, except that no playground shall have an area of less than twenty-five hundred (2,500) square feet.

e. All streets and drives in the trailer court shall be paved with a seal coat, asphaltic concrete or Portland cement concrete pavement.

20. Buildings, structures, and premises for public utility services, of public service corporations, which buildings or uses the Governing Body, after report of the Planning Commission, deems reasonably necessary for public convenience or welfare.

21. Any occupation or work wherein the property owner is individually employed having to do with the personal service toward his or her customer, i.e., beauty shops, and sewing. (Ord. No. 2-1974-3, 2-12-74)

* * *

1191

Plaintiffs' Exhibit No. 1-A

ORDINANCE

NO. 3-1982-11

AN ORDINANCE AMENDING APPENDIX A, ZONING ORDINANCE, OF THE CITY OF CLEBURNE CODE OF ORDINANCES

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CLEBURNE:

SECTION I. It appearing to the City Council of the City of Cleburne that Appendix A, ZONING ORDINANCE, should be amended so that recreation or amusement machines which are operated for profit and are to be located

on a floor or level of a building which is not located on the ground floor or street level be classified as a use for which a special use permit is required and so that circuses and carnivals no longer be classified as uses for which special use permits are required, the same is amended and shall read henceforth as follows:

APPENDIX A. ZONING ORDINANCE

Section 16. Special use permits.

Each applicant shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used for the following purposes under the special use permit:

1. Amusement parks, commercial baseball or athletic fields, race tracks, fairgrounds, or operations for profit of recreation or amusement machines, as defined in Section 23-54 (a) of the Code of Ordinances, which machines are to be located on a floor or level of a building which is not located on the ground floor or street level of a building.

All other sections of said Ordinance shall remain in force and effect and are not waived, amended or changed in any manner.

SECTION II. This Ordinance shall have effect and be in full force from and after March 22, 1982.

PASSED AND APPROVED this the 9th day of March, 1982.

(Signatures and certification omitted in printing)

Plaintiffs Exhibit No. 1-B

ORDINANCE

NO. 4-1982-12

AN ORDINANCE AMENDING APPENDIX A, ZONING ORDINANCE, OF THE CITY OF CLEBURNE CODE OF ORDINANCES.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CLEBURNE:

SECTION I. It appearing to the City Council of the City of Cleburne that Appendix A, Zoning Ordinance, should be amended so that buildings, structures, and premises for public utility services be deleted from the uses for which a special use permit is required thereby advancing for purposes of sequential enumeration to the 20th listed use for which a special use permit is required the 21st listed use which is any occupation or work wherein the property owner is individually employed having to do with the personal service toward his or her customer, i.e., beauty shops, and sewing, and so that certain buildings, structures, and premises for public utility services be located in District R-1, Single Family Dwelling District which public utility services are controlled by the City of Cleburne or one of its public utility franchises, the same is amended and shall read henceforth as follows:

APPENDIX A. ZONING ORDINANCE

Section 6. District R-1 Single Family Dwelling District.

USE REGULATIONS

9. Sanitary sewer lift stations, elevated water storage facilities, pressure reducing or boosting facilities, water ground storage facilities, water wells and associated pumping and treating facilities, telephone cable junction or splicing facilities, power boosting facilities,

substation facilities, and any other system facility necessary by design to be placed in specific locations to facilitate the delivery of public utility services. Final placement and design of any such facility or station will be subject to final approval of the City Engineer.

10. Accessary [sic] uses, customarily incident to the above uses and located on the same lot therewith, not involving the conduct of a business or industry. No equipment, material or vehicle other than motor passenger cars shall be stored in any residential district.

Section 16. Special Use Permits.

20. Any occupation or work wherein the property owner is individually employed having to do with the personal service toward his or her customer, i.e., beauty shops and sewing.

All other sections of said Ordinance shall remain in force and effect and are not waived, amended or changed in any manner.

SECTION II. This Ordinance shall be passed and it shall have effect and be in full force from and after its passage as provided by law, and it is so ordained.

PASSED AND APPROVED this the 13th day of April, 1982.

(Signatures and certification omitted in printing)

Plaintiffs' Exhibit No. 2

[LETTERHEAD OF CITY OF CLEBURNE]

September 29, 1980

Ms. Bobbie Northrop
201 Featherstone
Cleburne, Texas 76031

Dear Ms. Northrop:

Pursuant to your request of Mr. Andy Anderson, the Public Works Director, I will attempt to explain why a Special Use Permit is required for the operation of a home for mentally deficient individuals.

Your residence is located in an R-3 zoning area. The Code of Ordinances of the City of Cleburne permits "Hospitals, sanitariums, nursing homes, or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts" in an R-3 zone. Although a home for "mentally deficient" persons is not specifically excluded, *Webster's New Ideal Dictionary* defines the term "feeble-minded" as "mentally deficient".

For exceptions to R-3 zoning one is advised to look to the section in the Code of Ordinances dealing with Special Use Permits. A Special Use Permit is required under Section 16 of Appendix A for "Hospitals for the feeble-minded." Therefore, upon that basis Andy Anderson and I felt that it would be necessary for you to obtain a special use permit in order to operate your proposed facility.

Sincerely,

ROBERT MILLER
Robert T. Miller, Jr.
Assistant City Attorney

RTM:dsw

cc. Andy Anderson

Plaintiffs' Exhibit No. 5

PLAINTIFF'S EXHIBIT 5

CASH AND INVESTMENT ASSETS AT END OF FISCAL YEAR

Type of asset			
Cash and deposits		1,581,659	1,091,197
U.S. Treasury securities		353,857	
Federal agency securities (Government-owned agencies such as Export-Import Bank, FHA, GNMA, Freddie Mac, Sallie Mae, Farmers Home Administration, Federal Farm Credit Banks, Federal Home Loan Banks, Federal Land Banks, Federal Intermediate Credit Banks, Federal Home Loan Mortgage Corporation, Federal Service, and TVA)			
State and local government securities			
Other securities (Stocks, bonds, mortgages, etc., not included in the foregoing categories. Include the following securities issued by Federal agencies: Fed. Land Banks, banks for cooperatives, and Federal intermediate credit banks. Include accrued interest on all of the securities and any other investments held.)			

EXPENDITURES OF GENERAL REVENUE SHARING FUNDS

44 2 126 0037

Alabama City, Ala.

FY 81

	Column A — PROJECTED expenditures (planning expenditures)		Column B — ACTUAL expenditures (see Planning Expenditure Report)		Column C — CODES (for use by GSA)
	Current (a)	Capital (b)	Current (c)	Capital (d)	
		43,384	39,863	51,584	
		16,000		38,236	
				28,325	
Water				1,700	
Debt Service	120,000		120,000		

CERTIFICATION

	817	641-3721 321
Finance Director		December 8, 1981

Part IV — CASH AND INVESTMENT ASSETS AT END OF FISCAL YEAR

Type of asset	Amount at end of Fiscal year — Cash assets: Funds in operating funds, as defined (a)	Funds in trust funds, as defined (b)	Funds in all other funds, excluding the gen. obligation fund (c)
1. Cash and deposits – Cash on hand and deposit, and funds in savings accounts	256,913	2,784,396	622,657
2. Federal securities – Obligations of U.S. Treasury (including short-term notes) and Federal Financing Bank	237,699		
3. Federal agency securities – Obligations of government owned agencies (excluding GSE: Export-Import Bank, FHA, GNMA, Postal Service, and TVA			
4. State and local government securities			
5. Other securities – Bonds, notes, mortgages, etc., not included in the foregoing classes, include the following securities: Federal Home Finance agencies: FHLB, FLB, FHMA; Banks for cooperatives; and Federal intermediate credit banks. Exclude corporate securities, value of real property, and any other investments or assets.			

Part V — EXPENDITURES OF GENERAL REVENUE SHARING AND ANTIRECESSION FISCAL ASSISTANCE FUNDS

44 1 1260037
Clebourne Ct, FA
F.Y. 80

Purposes or purposes of expenditures	GENERAL REVENUE SHARING AND FEDERAL ANTIRECESSION EXPENDITURES: Column A — PREFERRED (Authorized Revenue Sharing Expenditures) Current (a)	Column A Capital (b)	Column B — Amounts ACTUALLY expended from Revenue Sharing funds (see instruction 4 and 5) Current (c)	Column B Capital (d)	Column C — Amounts budgeted from Revenue Sharing funds (see instruction 4 and 5) Current (e)	Column C Capital (f)
1. Finance and general administration						
2. Education						
3. Libraries						
4. Welfare						
5. Hospitals						
6. Health						
7. Parks		13,000		4,037		
8. Police		[redacted]		[redacted]		
9. Fire						
10. [illegible]						
11. Sewerage						
12. Other operations						
13. Parks and recreation		40,000		13,674	7	
14. Utility systems – Gross revenue						
15. Interest on general debt						
16. Payment of principal on debt						
17. All other – Specify: Public Safety		[redacted]		[redacted]		

Remarks

Part VI — CERTIFICATION – I/We certify that the data contained in this report are accurate to the best of my knowledge and belief.

Signature of Official

Finance Director

Telephone: Area code 817, Number 645-2617, Extension 63

Date: November 20, 1980

Page 4

Part IV CASH AND INVESTMENT ASSETS AT END OF FISCAL YEAR

Type of asset	Amount at end of fiscal year – Book value: Held in purpose funds, as defined below (A)	Held in trust funds, as defined below (B)	Held in all other funds, except for cash shown in Column B (C)
1. Cash and deposits – Cash on hand and deposits, and time or savings deposits	11,826		81,350
2. Federal securities – Obligations of U.S. Treasury (including short-term notes) and Federal Financing Bank			
3. Federal agency securities – Obligations of government-owned agencies (including CCC, Export-Import Bank, FHA, GPMI, Postal Service, and TVA			
4. State and local government securities			
5. Other securities – Bonds, notes, mortgages, etc., not included in the foregoing classes. Include the following privately owned Federal agencies: FHLB, FLB, FNMA, banks for cooperatives, and Federal intermediate credit banks. Exclude accounts receivable, value of real property, and any other nonsecurity assets.			

Part V EXPENDITURES OF GENERAL REVENUE SHARING AND ANTIRECESSION FISCAL ASSISTANCE FUNDS 44 2 126 003 Deduct interest and other expenditures (that exceed Column B) and other expenditures (not from funds listed in Column C) DO NOT INCLUDE expenditures made from any other sources. Deduct Expenditures From Non-Entitlement Funds Deduct Capital Expenditures Deduct Expenditures for Construction Deduct Interest Expenditures Deduct Expenditures for Capital Improvements Deduct Expenditures for Capital Improvements Deduct Expenditures for Capital Improvements

Plaintiffs' Exhibit No. 10

[LETTERHEAD OF TEXAS DEPARTMENT OF HEALTH]

July 21, 1980

Mr. David Southern
826 Thorp Springs Road
Granbury, Texas 76048

SUBJECT: Residence at 201 Featherstone; Cleburne, Texas

Dear Mr. Southern:

This letter will summarize the thought and outcome of our meeting in Cleburne of July 17th concerning the conversion of the above referenced residence to an MR-I facility.

This residence is of frame construction with the exterior materials consisting of both wood and stucco. The roof is composition shingles. It is located across the street from Cleburne Junior High School on the corner of Featherstone and Buffalo Streets, approximately one-half mile from the city square. I would assume the fire protection/response time to be as adequate as anywhere in the city.

The building appears to be basically sound, but does need some repair and maintenance as listed elsewhere in this letter. It is understood that you intend to request certification for thirteen residents and you have verified the area (sq. ft.) requirements for this number of people. You also declared your intentions to remodel the large bath into one full bath and one half-bath with separate hall entries. The wall finishes in the existing smaller bath should be changed to a more durable, sanitary material, also, such as ceramic tile and/or vinyl wall covering. New tub and shower enclosures could be fiberglass, as discussed.

The following list of specific items were discussed with you at the site:

1. In remodeling, change the bathroom wall finishes to ceramic tile or use fiberglass tub/shower enclosures as discussed.

2. New carpet is needed in certain areas.
3. All door latch sets must be changed out to a type that does not need a key to unlock from the interior.
4. The gas-fired water heater must be enclosed and combustion air supplied to it from the exterior.
5. The stucco needs repairing, the brick chimneys need repointing, and the exterior wood siding must be painted.
6. An N.F.P.A. 72 fire alarm system must be installed as recommended in the "guidelines for fire alarm systems for MR-I facilities".
7. A gas leakage test must be performed on the facility (This is an annual requirement), and a letter of documentation furnished by the tester must be kept on file at the facility.
8. The gas heater must be provided combustion air from the exterior.
9. The building needs re-roofing and some of the decking and soffit material should be replaced as required.

I feel that this house can make an adequate MR-I facility with attention given to these factors and with the proper program. If we can be of further service, please let us hear from you.

Very truly yours,

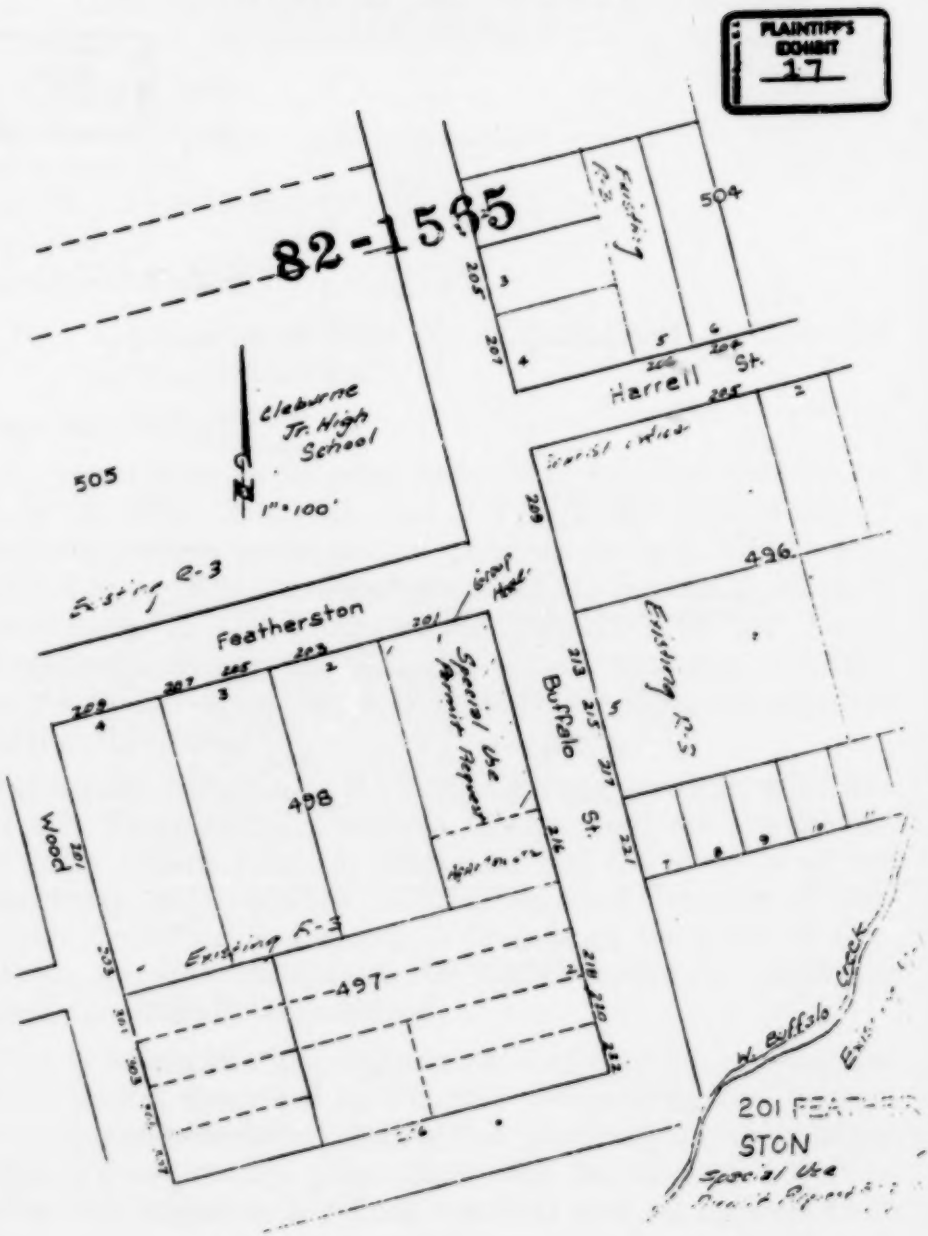
Clements C. Koehler
Architect
Life Safety Code Division

Enclosures

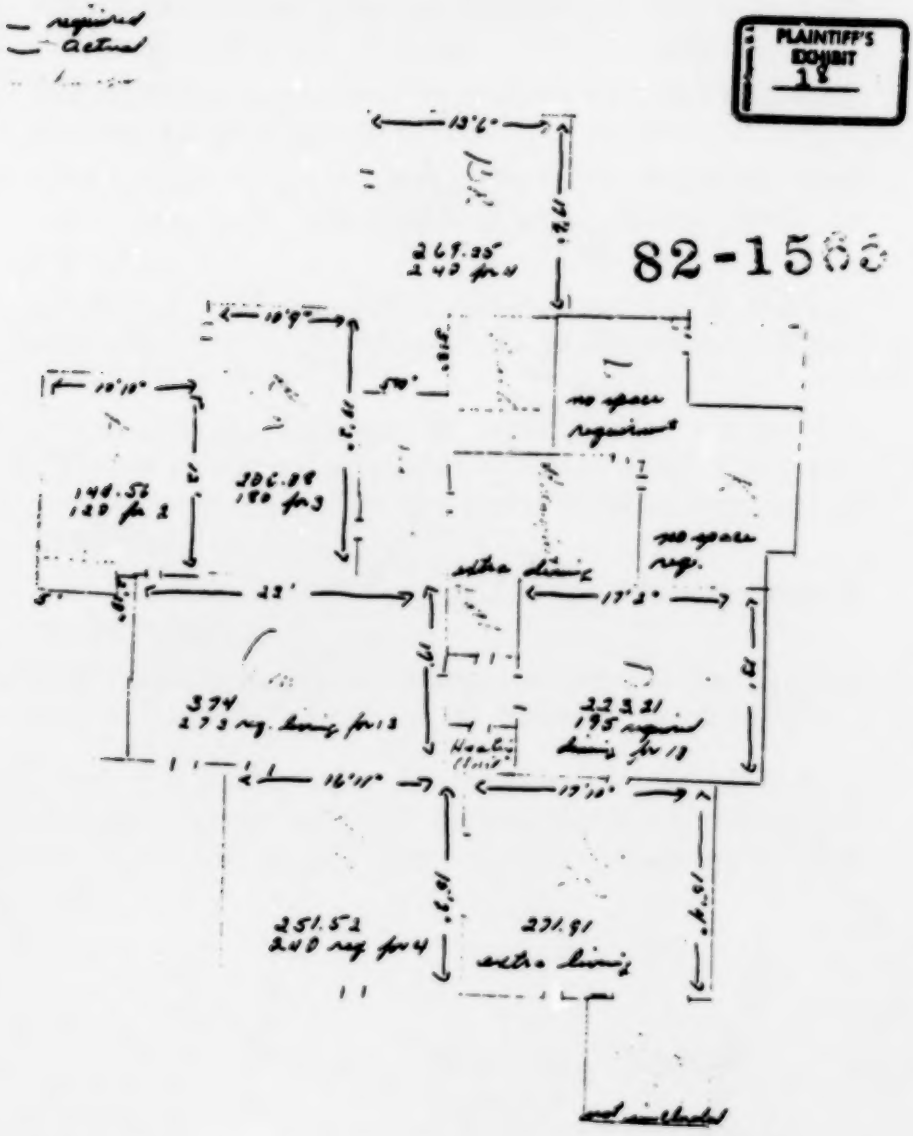
CCK/djg

cc: Randy Rickels, Chief Architect — MR Program, Life Safety Code Division file

Plaintiffs' Exhibit No. 17



Plaintiffs' Exhibit No. 18



Plaintiffs' Exhibit No. 28

[LETTERHEAD OF TEXAS DEPARTMENT
OF HUMAN RESOURCES]

November 4, 1981
Mr. Renea Hicks
Advocacy, Inc.
5555 N. Lamar Blvd.
Suite K-109
Austin, Texas 78751

Re: Application of Rule No. 326.35.03.004 to Cleburne Living Centers, Inc.

Dear Mr. Hicks:

The above referenced rule, which was initially adopted on July 13, 1981, indicated that ICF-MR providers who had applications for participation pending on that date would have 120 days to meet the requirements for certification to participate in the program. As published in the Texas Register on August 18, 1981, this requirement was described as giving providers "until November 10, 1981, to complete their certification."

Our records reflect that the provider you represent, a facility at 201 Featherston, Cleburne, Texas, had an application pending before July 13, 1981, and had taken some of the necessary steps toward certification, but because of litigation involving the zoning ordinance of the City of Cleburne, some certification requirements cannot be completed until this litigation is resolved.

This is to confirm the department's interpretation that the time period described in the rule for meeting certification requirements is tolled during the pendency of such litigation. Consequently, your client will be allowed 120 days after the litigation has been resolved and all appeals have been exhausted to meet certification requirements. If such requirements are met within this time period, the facility will be considered within the class of facilities which were certified under this rule.

Sincerely,

Marlin W. Johnston
jbm

Defendants' Exhibit No. 10

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Resources Intermediate Care Facility for Mentally Retarded Eligibility for Participation 326.35.03

(Editor's note: Because the Texas Department of Human Resources' rules have not yet been published in the Texas Administrative Code (TAC,) they do not have designated TAC numbers. For the time being, the rules will continue to be published under their Texas Register Division numbers. However, the rules will be published under the agency's correct TAC title and part.)

The Texas Department of Human Resources proposes new Rule 326.35.03.005 in its rules for Title XIX Intermediate Care Facilities for the Mentally Retarded (ICF-MR) Program. The rule outlines requirements for ICF-MR provider applicants, with the exception of the Texas Department of Mental Health and Mental Retardation state school ICF-MR providers, to improve program administration. The rule presents criteria for facility size, site location, documentation of need, and programmatic services. These criteria provide greater assurance that facilities will be a normal residence with access to programmatic resources, that facilities will be well-integrated into the local community, and that facilities will meet a service need in coordination with other mental retardation/developmental disability service providers. These outcomes are of benefit to both developmentally disabled client consumers and the communities in which the facilities will be located.

The rule has been approved by the ICF-MR Executive Committee, representing private providers, developmental disability advocacy organizations, state school providers, the Texas Department of Health, Texas Education Agency, Texas Department of Mental Health, and Texas Department of Human Resources. This rule excludes Texas Department of Mental Health and Mental Retardation state school providers. This exclusion is based on Article II, § 4 (a), of the 1981-1982 Appropriations Bill

(House Bill 656). This special provision states that the Texas Department of Mental Health and Mental Retardation shall maximize the amount of medical assistance paid on behalf of patients in state hospitals for mental disease and in state schools for the mentally retarded.

David Hawes, director of programs budget and rate setting, has determined that for the first five-year period the rule will be in effect, there will be fiscal implications as a result of enforcing or administering the rule. Savings to the state are estimated to be $525,951 for fiscal year 1982; $6,681,215 for fiscal year 1983; $14,546,832 for fiscal year 1984; $21,834,634 for fiscal year 1985; and $31,586,237 for fiscal year 1986. There is no estimated additional cost nor is there any estimated loss or increase in revenue. The proposal has no fiscal implications for units of local government.

Mr. Hawes has also determined that the public benefit anticipated as a result of enforcing the rule as proposed will be the limitation of uncontrolled growth in the program. There are no economic costs to persons required to comply with the rule as proposed.

Written comments are invited and may be sent to Susan L. Johnson, administrator, Policy Development Support Division–340, Texas Department of Human Resources 153-B, P.O. Box 2960, Austin, Texas 78769, within 30 days of this publication.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

J. B. McReynolds
December 22, 1981

The new rule is proposed under Title 2 of the Texas Human Resources Code, Chapters 22 and 31, which authorize the department to administer public assistance.

.005. Provider Applications.

(a) Effective May 1, 1982, all applications (I, V, VI) for participation in the ICF-MR Program, with the excep-

tion of state school ICF-MR providers, must meet the following requirements.

(1) Requested certification will be limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility.

(2) The proposed facility will be located within a given community according to the following specifications.

(A) The proposed facility must be located in an incorporated city which is subject to special use permit requirements, local zoning, and/or occupancy code requirements and must be noncontiguous to an already existing facility.

(B) No other ICF-MR residential facility is located within the same neighborhood within a three-mile radius.

(C) Access to community resources, such as shopping, transportation, recreation sites, is documented (as appropriate to level of client).

(3) A needs assessment has been conducted to include the following.

(A) Identification is made of the number of developmentally disabled persons residing in the community and surrounding geographic area (defined in assessment) that can benefit from the services provided by this facility.

(B) Other ICF-MR residential facilities, if any, located within the same community and/or geographic area as identified by name. Number and level of clients served is also stated.

(C) If the facility will serve the mentally retarded, letters are obtained from at least the superintendent of the state school and the executive director of the local MH/MR center (if applicable) in whose catchment area the proposed facility is located. Letters from the state school and community center should include a statement as to the number

of persons who will meet the basic admission criteria to the faciilty. The applicant could also provide the number of potential referrals from other state schools and/or MH/MR programs according to program location.

(D) In the event that the facility will serve clients other than the mentally retarded, the provider will obtain letters from the appropriate referral sources.

(4) A written description is submitted of the client group to be served, including admission criteria.

(5) A description is developed of the programmatic support services (as defined by Code of Federal Regulations 442.400) which will be required by the clients served. Copies of letters of intent, memoranda of understanding, or contracts accompany the description for each service identified.

(b) Subsequent to the receipt by the Texas Department of Mental Health and Mental Retardation of the application for participation in the ICF-MR Program and prior to the request for a certification survey by the Texas Department of Health, the Texas Department of Mental Health and Mental Retardation will meet the applicant to determine that the requirements in this rule have been met. The contract for services is dependent on the satisfactory compliance with these criteria.

Issued in Austin, Texas, on December 29, 1981.

TRD-819413 Marlin W. Johnston
Commissioner
Texas Department of Human Resources

Proposed date of adoption: February 8, 1982
For further information, please call (512) 441-3355, ext. 2037.

Defendants' Exhibit No. 12

1(0-480-001-1 | DEPARTMENT OF TAXATION | 22 |

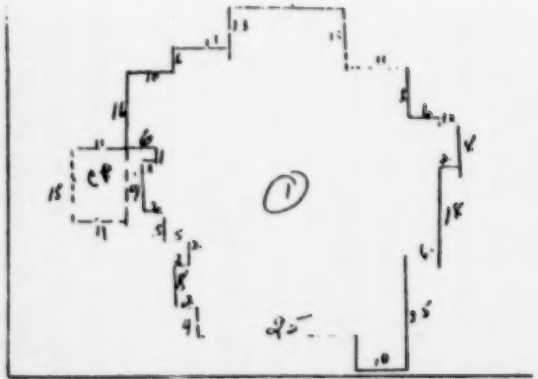
LOT or ABSTRACT	BLOCK or TRACT	ADDITION/SURVEY	ACRES
N 2/3 of Lot 1	498	Original Cleburne	

OWNERSHIP	MAILING ADDRESS	VOL.	PAGE	DATE	CONSID.
Turner, Mrs. B. H.					
McWhirter, Henry C.	201 Featherstone	652	655	11/74	
LAHMAN JANICE A	Rt 1 Box CLEBURNE TX DT 386/236				

LIENHOLDER	ADDRESS	VOL.	PAGE	DATE	CONSID.

DEFENDANT'S EXHIBIT NO. 12

	Concrete	Area	Stories	Yr. Built	1918
	Conc Blk	Finished	Window Unit	1917	
	Brick	Unfinished	Central H/A	CLASS	
	Pier-Beam		All Electric		
	Post		Fireplace	(4w) 5	
		INTERIOR		UTILITIES	
EXTERIOR		Sheetrock		Water	
Rock	ROOF	Paneled	PLUMBING	Sewer	
Frame	Comp	Paper	No. Baths	Elec.	
Brick Ven	Wood Shgl.	Painted	No. R Rooms	Gas	
Stone Ven	Tar-Gravel			All Util.	✓
Hayshite Blk	Metal				
Stucco		FLOOR	CONDITION		
Asbestos	Galde	Pine	Good	ST-ROAD	
Metal	Hip	Hardwood	Average	Paved	✓
Steel Frame	Flat	Concrete	Poor	Gravel	
Conc Tilt	Gambrel	Carpet	EXTRAS	Dirt	
Masonry	Mansard	Asph. Tile	Intercom	Curb	
Siding	Shed	Dirt	Yard Light	Sidewalks	
			Leaded Glass		



STREET ADDRESS:

YEAR	RENDERED VALUE	ASSESSED VALUE
19		
19 70		5490
19 78	12175	12450
19		
19		
19		
19		
19		
19		
19		
19		

STRUCTURE TYPE	SQ. FOOTAGE	UNIT PRICE	REPR. COST	% GOOD	VALUE
Residence	2510	$ 800	$ 2211	40	$ 1
C P	165	$ 302	$ 22		$ 12
Fl. Kit.		$	$ 100		$ 9
Ext Bath		$	$ 50		$ 37
		$	$		$

DATE ISSUED	PERMIT NO.	AMOUNT

YEAR	LOT SIZE	UNIT PRICE	VALUE
19			$
19			
19			
19			
19			

TOTAL IMPROVEMENT VALUATION..... $

TOTAL LAND VALUATION ..... $

TOTAL APPRAISED ..... $

[R. Vol. I, p. 238]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. CA3-80-1576-F

CLEBURNE LIVING CENTER, INC., ET AL.

V.

CITY OF CLEBURNE, TEXAS, ET AL.

ORDER

On or about April 28, 1982 this Court took the merits of this bench trial under advisement. The Court has preliminarily concluded its findings of fact and the research related to its conclusions of law. Nevertheless, at this time the Court is troubled by Plaintiffs claims brought under the Mentally Retarded Persons Act of 1977, TEX.REV.CIV. STAT.ANN. art. 5547-300, § 7. This, of course, is the first claim for relief which the Court must reach in the proper order of things. Section 7 of the Act, entitled "Right to least restrictive living environment," provides as follows:

> "Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities. This includes the person's right to live in a variety of living situations, such as the right to live alone, in a group home, with a family, and in a supervised, protective environment."

It would be a mild understatement to say that the substantive rights guaranteed by section 7 are in issue in this litigation. Certainly, section 7 would have to be construed in light of the zoning powers granted by the legislature to cities and incorporated villages, see TEX.REV.CIV.STAT. ANN. art. 1101a-j, and a delicate balance struck. Given that the Act has never before been construed by the courts of Texas with reference to zoning powers, the Court is loathe

to decide Plaintiffs' rights under the virginal act. Depending upon the proper construction to be given section 7, and the related remedial sections of the Act, see TEX.REV.CIV. STAT.ANN. art. 5547-300 §§ 63-67, a decision of Plaintiffs' federal statutory and constitutional claims could be unnecessary. [R. Vol. I, p. 239] As a result of the newness and related uncertainty regarding the reach of the Act, and the general administrative framework accompanying the Act, it appears to the Court that both *Pullman and Burford* abstention may be appropriate. *See Railroad Commission of Texas v. Puliman*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). This case has, however, gone to trial and the Court is mindful that this is a factor to be considered under the abstention doctrines. Nevertheless, the Court is of the opinion that the case presents "exeptional circumstances." Abstention with regard to the Mentally Retarded Persons Act has never heretofore been made an issue in this case. Instead, Defendants sought abstention on grounds that Texas provides Plaintiffs with a forum for determinations as to the proper construction of the Cleburne ordinance, and whether or not the ordinance is arbitrary and capricious under Texas law. The Court refused to abstain on those grounds and remains convinced that such a refusal is proper under federal law.

Given the above discussion, the Court has concluded that the parties should address the issues raised by the Court in this Order prior to a formal ruling by the Court. Accordingly, the respective sides shall submit short letter briefs with the Court no later than August 12, 1982. A hearing on the issues is scheduled for Friday, August 13, 1982 at 11:00 a.m.

So ORDERED this 28th day of July, 1982.

Robert W. Porter
UNITED STATES DISTRICT JUDGE

[R. Vol. I, p. 241]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-80-1576-F

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, et al.,
Defendants

STIPULATION OF VOLUNTARY DISMISSAL OF PLAINTIFFS' PENDENT STATE CLAIMS

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, it is hereby stipulated that the plaintiff's pendent state claims in the above styled and numbered cause, as set forth in paragraphs 35-37 and 40-42 of the First Amended Complaint, are dismissed with prejudice.
Dated: August 9, 1982

RENEA HICKS

RENEA HICKS
Advocacy, Inc.
5555 N. Lamar, Suite K-109
Austin, Texas 78751
(512) 475-5543

ATTORNEY FOR PLAINTIFFS

EARL LUNA

EARL LUNA
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

ATTORNEY FOR DEFENDANTS

[R. Vol. I, p. 240]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-80-1576-F

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs

vs.

CITY OF CLEBURNE, TEXAS, et al.,
Defendants

ORDER OF DISMISSAL

Pursuant to the Stipulation of Voluntary Dismissal of Plaintiffs' Pendent State Claims under Rule 41(a)(1)(ii), F.R.C.P., filed on August 9, 1982, it is hereby

ORDERED that the plaintiffs' pendent state claims in this action, as set forth in paragraphs 35-37 and 40-42 of the First Amended Complaint, are dismissed with prejudice to their refiling.

SIGNED and ENTERED this 9th day of August, 1982.

Robert W. Porter
UNITED STATES DISTRICT JUDGE

APPROVED AS TO
FORM AND SUBSTANCE:

RENEA HICKS
Attorney for Plaintiffs

EARL LUNA
Attorney for Defendants

[R. Vol. I, p. 242]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLEBURNE LIVING CENTER, INC., et al.

vs.

CITY OF CLEBURNE, TEXAS, et al.

NO. CA3-80-1576-F

MEMORANDUM OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Plaintiff Cleburne Living Center, Inc. (hereinafter referred to as "CLC") is a three shareholder Texas corporation organized for the purpose of establishing and operating supervised group homes for persons who are mentally retarded. The corporation is not a non-profit organization. It has leased a house at 201 Featherston Street in the City of Cleburne, Texas from Jan Hannah for the purpose of establishing a group home for thirteen mentally retarded adults at that address. On or about February 4, 1982, CLC changed its corporate name to Community Living Concepts, Inc., but the name change left unaffected all other aspects of CLC.

2. Plaintiff Jan Hannah is CLC's Vice President and holds one third of the corporation's outstanding stock. She is the owner of the house at 201 Featherston Street in the City of Cleburne, having purchased it in July, 1980, for the purpose of leasing it to CLC for the operation of a group [R. Vol. I, p. 243] home for persons who are mentally retarded.

3. Plaintiff Johnson County Association for Retarded Citizens (hereinafter Johnson County ARC) is a non-profit Texas corporation established for the purpose of advocating and representing the interests of the mentally retarded

residents of Johnson County. It has approximately two hundred (200) members, among whom are parents of mentally retarded children and adults, mentally retarded persons (at least one of whom, Sylvia Sims, is a potential resident of the home), special education teachers and educational diagnosticians employed by the Cleburne Independent School District, and other concerned Johnson County residents. As an organization, it supports the establishment of group homes, including the Featherston Street one, for persons who are mentally retarded.

4. Plaintiff Advocacy, Inc., is a non-profit Texas corporation formed to insure and protect the legal rights of persons who are developmentally disabled, including those who are mentally retarded persons. It is a statewide legal advocacy system affiliated with the State Bar of Texas and established pursuant to 42 U.S.C. § 6012. Among the rights for which Advocacy, Inc. advocates is the right of mentally retarded persons to live in group homes in community settings.

5. Defendant City of Cleburne is a municipal corporation established pursuant to the laws of the State of Texas. As a Texas municipal corporation, the city has certain powers and duties, among which are certain zoning powers.

[R. Vol. I, p. 244]

6. Defendant George W. Marti is the Mayor of the City of Cleburne. In conjunction with his duties as mayor, he is the chairman of the City of Cleburne City Council and a voting member of that council in case of ties.

7. Defendants J. T. Bass, Arval Martin, Jr., and Alfred Johns are elected, voting members of the City of Cleburne City Council which is empowered under Texas law to enact municipal zoning ordinances and which is responsible for granting or denying special use permits under the City of Cleburne zoning ordinance.

8. Defendant Robert Miller is the City Attorney for the City of Cleburne, responsible for the prosecution of violations of the City of Cleburne zoning ordinance.

9. In July, 1980, Jan Hannah purchased the lot and house located at 201 Featherston Street in Cleburne, Texas

(hereinafter sometimes referred to as the Featherston Street home). This property is officially described in Cleburne city records as the north two thirds of lot 1, block 498, of the City of Cleburne.

10. At the time of purchase by Jan Hannah, the Featherston Street home was in a district classified under Cleburne's zoning ordinance as an apartment house district. The use district also is called an R-3 zone. That zoning classification is still the same for the home at the time of trial.

11. On June 8, 1965, the City Council of the City of Cleburne enacted a zoning ordinance for the city which included for the first time in the city zoning ordinance the [R. Vol. I, p. 245] texts of §§ 8(6) and 16(9) of the current ordinance as they now read.

None of the current city council members of the City of Cleburne were members of the city council on June 8, 1965.

12. Under Section 8 of Cleburne's zoning ordinance, the following uses are all permitted uses in a district zoned R-3, including the district in which the Featherston Street home is situated:

(1) Any use permitted in District R-2.

(2) Apartment houses, or multiple dwellings.

(3) Boarding and lodging houses.

(4) Fraternity or sorority houses and dormitories.

(5) Apartment hotels.

(6) Hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts.

(7) Private clubs or fraternal orders, except those chief activity is carried on as business.

(8) Philanthropic or eleemosynary institutions, other than penal institutions.

(9) Accessory uses customarily incident to any of the above uses, and located on the same lot, not involving the conduct of a business or industry.

a. There shall be permitted such facilities as are customarily accessory to the operation of an apartment hotel when conducted and entered from within the building.

b. Private or storage garages, located as provided in District R-1 for private garages, may provide space for not more than one motor vehicle for each seven hundred and fifty (750) square feet of lot area. No business occupation or services connected with motor vehicles, except washing occupant autos shall be permitted.

[R. Vol. I, p. 246]

(10) Signs as provided in Section 21.

13. Under Section 16, subdivision 9, of Cleburne's zoning ordinance, "[h]ospitals for the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions" are listed as uses requiring the issuance of a special use permit by the Cleburne city council before such use of property in the city may be made.

14. Under Cleburne's zoning ordinance, each special use permit issued is good for only one year.

15. On July 28, 1980, after being told by the responsible city officials of the necessity for doing so if they wished to operate the Featherston Street home as proposed, Jan Hannah and Bobbie Northrop paid the city $40 to apply for a special use permit. The permit was sought to operate the Featherston Street home as a "Residential Care facility for Mentally Retarded Adults".

16. On August 18, 1980, the city's Planning and Zoning Commission held a hearing and voted to deny the special use permit for the Featherston Street home.

17. Although it originally had planned to start operation of the Featherston Street home around October 1, 1980,

CLC, in the face of the zoning problems with the city, postponed the planned operational date to November 1, 1980.

18. On September 29, 1980, the City of Cleburne, through its then Assistant City Attorney, Robert T. Miller, Jr., sent a letter to Bobbie Northrop stating that a special use permit was required to operate the Featherston Street home and classifying the proposed use as a hospital for the [R. Vol. I, p. 247] feebleminded. Bobbie Northrop received this letter shortly after it was sent.

19. On October 14, 1980, the City Council of Cleburne held a public hearing on the special use permit application for the Featherston Street home and, in a three to one vote, voted to deny the permit application.

20. The Featherston Street home will house thirteen mentally retarded adults and will be operated by CLC as a Level I Intermediate Care Facility for the Mentally Retarded (hereinafter sometimes referred to as an ICF-MR) under extensive regulations and guidelines established and administered by the United States Department of Health and Human Services, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health. CLC plans to comply with all applicable and valid statutes, regulations, codes, and ordinances.

21. The structure at 201 Featherston Street is a large, one story frame house containing a living room, an alcove, a dining room, a breakfast room, a kitchen, an attic, a laundry room, four bedrooms, a den, and two baths, with a half bath to be added. It is on a corner lot, and there are front, side, and back yards, as well as a large front porch. Across the street to the north of the Featherston home is a public junior high school which numbers among its students about thirty mentally retarded children between the ages of nine and twenty one years. Directly behind the Featherston home to the south is a two story apartment house. A dentist's office is [R. Vol. I, p. 248] on the corner northeast of the Featherston home.

22. The people who will live in the Featherston Street home will be men and women eighteen years of age or older who are mildly or moderately mentally retarded. They will be completely ambulatory.

23. The Featherston Street home will have twenty four hour supervision, divided basically into eight hour shifts. Besides handling administrative matters, some cooking, and some cleaning chores, the staff will work with the mentally retarded residents to train and teach them in such areas as kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities. The program for each resident will be flexible, depending on his or her needs, and will be based on an individual program plan prepared for each resident of the group home by an interdisciplinary team. Although a registered nurse will visit the home once a month, there will be no licensed nursing or medical staff in the home or employed by CLC. The residents will have jobs in the community and in a work activity center. They probably will not have private automobiles. Their stay at the Featherston Street home will be voluntary, and its length will be indeterminate.

24. If the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.

25. Beginning in fiscal year 1980 (which started on October 1, 1979) and continuing in each of the next two fiscal years, the City of Cleburne has been a recipient of federal financial assistance, including financial assistance under the State and [R. Vol. I, p. 249] Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221, *et seq.* (hereinafter referred to as the Revenue Sharing Act). The city received revenue sharing funds equalling $203,361 in fiscal year 1980, $203,433 in fiscal year 1981, and at least $51,357 thus far in fiscal year 1982.

26. The city's city council is the principal allocator of revenue sharing funds within the city, and it is responsible to the federal Office of Revenue Sharing for the accounting of the receipt and use of revenue sharing funds.

27. Revenue sharing funds have been spent in the following ways, among others: (a) road construction; (b) the purchase of capital equipment for the city's department of public works; (c) the purchase of capital equipment for City Hall; (d) water utility systems; (e) parks and recreation; (f) debt service; and (g) library materials.

28. A civil rights complaint against the City of Cleburne, alleging that the zoning ordinance and the denial of the special use permit that are at issue in this case violate the Revenue Sharing Act antidiscrimination provisions, was filed with the federal Office of Revenue Sharing by Cleburne Living Center, Inc., on its own behalf and on behalf of the mentally retarded potential residents of the Featherston Street home. The Office of Revenue Sharing received the complaint on September 29, 1981, and, as of March 22, 1982, a determination had not been made or issued by that federal office with respect to the complaint.

[R. Vol. I, p. 250]

29. The city council's vote on October 14, 1980, as well as the city Planning and Zoning Commission's earlier vote on August 18, 1980, to deny a special use permit for the Featherston Street group home was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.

30. Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

31. No group homes or hospitals for persons who are mentally retarded are in Cleburne. One is, however, located

in Keene, Texas. Keene is also in Johnson County and is approximately 15 minutes by automobile from Cleburne.

32. Persons who are mentally retarded historically have been subjected to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements.

33. None of the named Plaintiffs themselves are developmentally disabled.

34. Members of the City Council of Cleburne considered the following factors in their decision to deny Plaintiffs a special use permit for the house at 201 Featherston Street:

> a. the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;
>
> [R. Vol. I, p. 251]
>
> b. the location of a junior high school across the street from 201 Featherston;
>
> c. concern for the fears of elderly residents of the neighborhood;
>
> d. the size of the home and the number of people to be housed;
>
> e. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;
>
> f. the home's location on a five hundred (500) year flood plain; and
>
> g. in general, the presentation made before the City Council.

35. Plaintiffs were given a full and fair opportunity to voice their views to the City Council concerning their application for a special use permit.

36. In their operation of the group home, Hannah and CLC planned to obtain fees from the residents, and in the

event that the residents were unable to pay, subsidies from Medicaid. A Level I Intermediate Care Facility program in Texas is a Medicaid funded program.

37. ICF-MRs are required by the State of Texas to meet certain certification requirements set forth in Plaintiffs' Exhibit 25. CLC preliminarily sought certification of its proposed facility. On or about July 21, 1980 the Texas Department of Health indicated to Mr. David Southern, a one-third shareholder in CLC, that the house at 201 Featherston would be an "adequate" ICF-MR Level I facility provided that certain repairs and modifications were made to the house. Because of the onset of this litigation, however, the requirements for certification were not completed and the Texas Department of Health has stated its intention to toll the one-hundred [R. Vol. I, p. 252] and twenty day period for the completion of the requirements pending the outcome of the litigation.

38. Subsequent to CLC's application for certification of the ICF-MR in Cleburne, the Texas Department of Human Resources issued new regulations with reference to ICF-MRs. The new regulations (see Defendant's Exhibit 10) state that certification as an ICF-MR will be limited to "six beds per facility." David Southern claims that state officials have agreed that the new regulation does not apply to the Cleburne facility retroactively.

39. Currently, the house at 201 Featherston will require approximately $8500.00 in repairs and modifications in order to meet certification requirements that have gone into effect since October of 1981.

40. The lease of 201 Featherston from Jan Hannah to CLC requires that the premises be used for "a residential training facility for the adult mentally retarded" and no other purpose. Because of the denial of the special use permit, in January of 1981 Hannah and CLC agreed to modify the terms of the lease. CLC continues to pay Hannah $600 per month for the future right to utilize the lease as

originally planned. The original lease called for the payment of $1300.00 per month.

41. There is no evidence that any of the federal funds received by the City of Cleburne pursuant to the Revenue Sharing Act are used to exercise the city's zoning powers. Further, the evidence is clear and convincing that, of the [R. Vol. I, p. 253] federal funds received by the city, none are used to exercise the city's zoning powers.

42. At all times material to the actions described above, each named individual Defendant was serving in his official capacity as an employee of the City of Cleburne, Texas. Further, at all times material to the actions described above, each named individual acted at all times in the due performance of his official duties and, in good faith, believed that he was carrying out those duties in a proper manner.

II. CONCLUSIONS OF LAW

A. Introdution

Plaintiffs predicate this action upon the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 *et seq.*, (hereinafter Federal Revenue Sharing Act) and the Fourteenth Amendment to the United States Constitution. In particular, Plaintiff CLC claims that Defendants have violated the nondiscrimination provision of the Federal Revenue Sharing Act, 31 U.S.C. § 1242(a)(1),[1] which incorporates the prohibitions found in the Rehabilitation Act, 29 U.S.C. § 794, pertaining to "otherwise qualified handicapped individual[s]." The Defendant City challenges CLC's standing to bring the claim and further asserts § 1242(a)(2)(A) of the Revenue Sharing Act[2] as a defense. All Plaintiffs assert Fourteenth Amendment challenges to the city's zoning ordinance, as written and as applied. In particular, Plaintiffs claim the acts of the Defendants amount to a denial of equal protection, a denial of procedural and substantative due process, and an infringement of Plaintiff's constitutional rights to travel [R. Vol. I, p. 254] and freedom of association. Defendants challenge the stand-

ing, both constitutional and prudential, of these litigants to assert the claims in question. In the alternative, Defendants assert that the ordinance as written and in operation suffers from no consitutional infirmities.

B. The Revenue Sharing Act and Rehabilitation Act Claim

1. CLC's standing

CLC raises this claim in its own right and in behalf of the group home's potential residents. The Revenue Sharing Act provision conferring standing for private civil actions states in pertinent part

> "Whenever . . . a unit of local government . . . has engaged or is engaging in any act or practice prohibited by this chapter [e.g., 31 U.S.C. § 1242(a)(1)] . . . a civil action may be instituted by the person aggrieved . . . ."

31 U.S.C. § 1244(a). *(emphasis added)* It is undisputed that CLC has properly exhausted its administrative remedies prior to the institution of this action. Congress, of course, may not abrogate the basic Article III standing requirements by statute. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 60 L.Ed.2d 66 (1979). Yet, it is apparent that CLC has shown injury in fact which can be redressed if the requested relief is granted. Further, the Court is ever mindful of the remedial purposes of the Act, and is hesitant to give the Act a narrow reading in light of its purposes. It is also without doubt that the interests asserted by CLC in this action fall within the "zone of interests" sought to be protected by the statute. *See Ass'n of Data Processing Service Organizations, Inc. v. Camp*, [R. Vol. I, p. 255] 397 U.S. 150, 25 L.Ed.2d 184 (1970). The Court finds further support in recent Supreme Court cases addressing the issue of statutory standing under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, *Havens Realty Corp. v. Coleman*, —— U.S. ——, 71 L.Ed. 2d 214 (1982);

Gladstone Realtors, supra; Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 34 L.Ed. 2d 415 (1972). Defendants contend, however, that none of the Plaintiffs are "otherwise qualified handicapped individual[s]" and that therefore they cannot be "persons aggrieved" within the meaning of the Act. The Court does not read this limitation into the Revenue Sharing Act. Instead, the Court concludes that the term "person aggrieved" indicates a willingness on the part of Congress to extend standing under the Act to all entities which can satisfy traditional Article III requirements. For the reasons set forth below, the Court concludes that CLC satisfies those requirements, including the prudential requirements for *jus tertii* standing in behalf of mentally retarded adults who are potential residents, or "clients" of the group home. In sum, CLC has standing to bring this action in its own right and on behalf of potential residents of the group home.

2. Section 1242(a)(2)(A). Defendants contend that they have demonstrated by clear and convincing evidence that the city's zoning activities are not funded in whole or in part by federal funds provided pursuant to the Revenue Sharing Act. There can be little doubt from the literal language of the Act that its prohibitions are "program [R. Vol. I, p. 256] specific." *Cf. North Haven Board of Education v. Bell*, —— U.S. ——, 50 U.S.L.W. 4501 (1982); *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). It is undisputed that the burden of the section 1242(a)(2)(A) defense falls upon Defendants. Defendants rely exclusively upon Plaintiffs' Exhibit Five (5), a breakdown of the city's expenditures of Revenue Sharing Act funds for the years 1979-1981. The exhibit shows that the city has spent the funds in question upon roads, police, parks and recreation, water and debt service. Apparently not all of the funds have been expended as there is a net positive balance. It is, of course, true that the city council has been the official recipient and "trustee" of the funds. (But this fact, without more, fails to rebut the force of Plaintiff's Exhibit Five.

To conclude that the prohibitions against discrimination incorporated into the Revenue Sharing Act from the Rehabilitation Act are applicable to the mere exercise of the city's zoning powers, without any further proof of a nexus between the exercise of those powers and the disbursement of Revenue Sharing Act funds, would eviscerate the "program specific" nature of the Act. In sum, Plaintiffs attempt to place a square peg in a round hole. The Defendants have shown by clear and convincing evidence that the zoning decisions in question were not funded in whole or in part with Revenue Sharing Act funds. Hence these claims will be dismissed on the merits.

C. THE CONSTITUTIONAL CLAIMS

1. Standing

There are four named Plaintiffs in this [R. Vol. I, p. 257] action who assert standing to litigate the constitutional claims: CLC; Jan Hannah; Johnson County Association for Retarded Citizens; and Advocacy, Inc. Only Hannah and CLC claim a right to money damages. All Plaintiffs seek *jus tertii* standing on behalf of adult mentally retarded citizens who are potential residents at the group home.

CLC and Jan Hannah have clearly shown that they have standing in their own right to assert the constitutional claims. Each has suffered injury in fact as a direct result of Defendants' conduct. Each has a personal stake in the outcome sufficient to assure the "concrete adverseness" required by Article III. Finally, the requested injunctive relief would ameliorate the particular alleged injury. For these reasons then, *see e.g. Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 50 L.Ed 2d 450 (1977), *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975), *Baker v. Carr*, 369 U.S. 186, 7 L Ed.2d 663 (1962), the Court concludes CLC and Hannah may bring this action in their own right.

In addition, the Court is also of the opinion that CLC and Hannah have standing to litigate the constitutional rights of mentally retarded citizens who are potential residents of the proposed group home. Limitations on a litigant's

assertion of *jus tertii* standing are not constitutionally mandated, but instead stem from a salutory "rule of self restraint." *Craig v. Boren*, 429 U.S. 190, 50 L Ed.2d 397 (1976). CLC and Hannah are virtually indistinguishable from [R. Vol. I, p. 258] the vendors in *Carey v. Population Services Int'l.*, 431 U.S. 678, 52 L.Ed.2d 675 (1977), *Craig, supra*, and *Eisenstadt v. Baird*, 405 U.S. 438, 31 L Ed.2d 349 (1972). On this authority the Court concludes Hannah and CLC are proper litigants to champion the constitutional rights of adult mentally retarded citizens who are potential residents or "clients" of the group home. *See also Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1036 (5th Cir. 1980).

The Court reaches a different conclusion with regard to the Johnson County Association for Retarded Citizens. The record is devoid of any sufficient injury, economic or non-economic, to the Association which would justify its inclusion into this litigation. *See Warth v. Seldin*, 422 U.S. 490, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636 (1972). Further, there is no evidence that the Defendants' conduct has in any way adversely affected the associational ties of the association's members. Id. For these reasons then the Johnson County Association for Retarded Citizens will be dismissed from this litigation.

Advocacy Inc., an independent state agency created pursuant to 42 USC § 6012, also as standing to represent adult mentally retarded citizens who are potential residents of the group home. *See Goldstein v. Coughlin*, 83 FRD 613 (W.D. N.Y. 1979); *Naughton v. Bevilaegua*, 458 F.Supp. 610, 617 (D.R.I. 1978). *But see Developmental Disabilities Advocacy Center, Inc.*, 521 F.Supp. 365 (D.N.H. 1981). This is especially appropriate where, as is true in the instant case, Hannah and CLC have shown that they are proper litigants [R. Vol. I, p. 259] according to constitutional and prudential standing requirements. Advocacy Inc., however, is not a proper litigant insofar as it purports to represent the individual interests of Hannah and CLC.

2. Equal Protection

Plaintiffs assail the city's zoning ordinance, as written and as applied, on grounds that it denies mentally retarded citizens their rights to equal protection. In accordance with traditional equal protection analysis, the Court first notes that the ordinance in question and the denial of the special use permit do not impact upon any fundamental right guaranteed to Plaintiffs by the United States Constitution. Hence, the Court focuses upon whether the ordinance, as written and as applied, creates a suspect classification. There can be little doubt that Cleburne's zoning ordinance selectively discriminates against the "insane or feeble minded."

The traditional factors for the determination of a suspect class are found in *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 36 L Ed.2d 16 (1973). Although classification according to mental retardation has never been examined by the Supreme Court, *see Schweicker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981), several lower courts have considered similar issues and arrived at conflicting results. For example, some Courts have rejected the contention that the mentally retarded are a suspect class, *Doe v. Colaulti*, [sic] [R. Vol. I, p. 260] 454 F.Supp. 621, 632 (E.D. Pa. 1978), *aff'd* 592 F.2d 704 (3rd Cir. 1979), *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 762 (E.D. N.Y. 1973), while others have stated that the mentally retarded constitute a "quasi-suspect" class prompting a heightened standard of review. *Sterling v. Harris*, 478 F.Supp. 1046, 1053 (N.D. Ill. 1979), *rev'd on other grounds sub nom. Schweiker v. Wilson*, 450 U.S. 221, 67 L.Ed.2d 186 (1981). *Frederick v. Thomas*, 408 F.Supp. 823, 836 (E.D. Pa. 1976); *Fialkowski v. Schapp*, 405 F.Supp. 946, 958-59 (E.D. Pa. 1975) *(dictum)*. The Court is of the opinion that mental retardation is not a suspect or quasi-suspect class prompting strict or heightened judicial scrutiny. In support of its conclusion the Court adopts the reasoning of the Third Circuit Court of Appeals in *Doe v. Colautti*, 592 F.2d 704 (3rd Cir. 1979). Accordingly, Cleburne's zoning ordinance will be afforded a presumption of validity and upheld if it can

be shown to bear some rational relationship to the city's legitimate purposes or interests. *San Antonio I.S.D. v. Rodriguez*, 411 U.S. 1, 40, 55, 36 L Ed 2d 16, 47, 56 (1973).

Subjected to this limited standard of review, the Court finds that the ordinance, both as written and applied, passes constitutional muster. Certainly the city has a legitimate interest in the location of a group home intended for the purpose of housing thirteen adult mentally retarded citizens. Cleburne does not absolutely bar such concerns in its jurisdiction, but instead merely exercises authority with regard to the location of such a home. The location of the group home raises many legitimate concerns with the city [R. Vol. I, p. 261] and its residents. Such concerns were voiced in the political process leading to the denial of the special use permit. In particular, the Court focuses upon the legal responsibility of CLC and its residents, as well as the safety and fears of residents in the adjoining neighborhood. Opponents of the special use permit also viewed the number of residents and the particular structure in which they were to be housed with skepticism. It should be noted that subsequent to the denial of the permit, the State of Texas, through its Department of Health Resources, has proposed and adopted Rule 326.35.03.005 which limits its certification of ICF-MRs to those which have six beds per facility or less. In sum, the Court is constrained to conclude that the zoning ordinance as written and as applied to Plaintiffs, is rationally related to legitimate purposes and interests of the City of Cleburne. It is not arbitrary, capricious or irrational.

3. Due Process — Police Power

Plaintiffs contend that the City of Cleburne has exceeded its legitimate police powers by virtue of the zoning ordinance, as written and as applied. In particular, Plaintiffs assert the ordinance and the decision to deny a special use permit bear neither a rational nor substantial relationship to the public health, safety, morals, or general welfare. *See e.g. Village of Euclid v. Ambler Realty Co.*, 272 U.S.

365, 395 71 L.Ed. 303 (1926); *Couf v. DeBlaker*, 652 F.2d 585, 588 (5th Cir. 1981); *Wheeler v. City of Pleasant Grove*, 644 F.2d 99, 100 (5th Cir. 1981). The Supreme Court has recently noted that the power of local governments to zone and control [R. Vol. I, p. 262] land use is undoubted and that its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. *Schad v. Borough of Mt. Ephram*, 452 U.S. 61, 68 L.Ed.2d 671, 680 (1981). At this point it is appropriate to distinguish between the interests asserted by Hannah and CLC in their own right as opposed to the interests asserted in their representative capacity. Hannah and CLC have an economic property interest in their own right. In their representative capacity they assert alleged liberty interests on behalf of mentally retarded adults who are potential residents or clients of the group home. In *Schad, supra*, the Supreme Court stated that where property interests are at stake, the ordinance need only be rationally related to legitimate concerns and not deprive the owner of economically viable use of the property. 452 U.S. at 68. Where a protected liberty interest is at stake, the ordinance must be narrowly drawn and further a sufficiently substantial government interest. *Id.*

The Cleburne ordinance, with respect to the individual interests of Hannah and CLC suffers from no constitutional infirmity. As discussed in section 2 above, the ordinance is rationally related to legitimate concerns of the city. Further, it does not deprive the owners of economically viable use of the property. Accordingly, Cleburne's ordinance is without constitutional infirmity with regard to the property interests asserted by Hannah and CLC.

The exercise of the city's inherent police powers with respect to the liberty interests of potential residents of [R. Vol. I, p. 263] the group home requires a more lengthy discussion. It is important to bear in mind that all the City of Cleburne has done is to reject a potential site for a group home. As was discussed earlier, the Court has rejected Plaintiffs' contentions that mentally retarded citizens constitute a suspect class. Plaintiffs, however, additionally contend that

the ordinance and the decision to deny the special use permit, impinge upon freedoms of association and travel. The Supreme Court has rejected similar contentions in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9, 39 L.Ed.2d 797, 803-04 (1974). Cleburne has merely denied Plaintiffs the right to conduct their business at a specific location in the City. Other locations are available and the Court can find no impingement upon constitutionally guaranteed rights of association and travel. For these reasons, it appears that the "liberty interest" test set forth in *Schad*, *supra* is inapplicable to the facts of this case. Under the limited standard of review governing mere property interests, the Court has already concluded the ordinance and denial of the special use permit withstand scrutiny. Further, were the court to apply the heightened state of review enunciated in *Schad*, the Court would likewise approve of the ordinance and denial of the special use permit. Cleburne's interest in selectively locating homes for the mentally retarded is substantial — the evidence indicates a concern for not only the rights of adjoining landowners but also for the potential residents of the home. The ordinance is drawn as narrowly as possible to accomodate these interests.

[R. Vol. I, p. 264]

Finally, the Court notes that the facts of this case bear little resemblance to those in *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 52 L.Ed.2d 531 (1977) and *State of Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73 L.Ed. 210 (1928). In *Moore*, the Court emphasized the government's intrusion into the "extended family" living arrangement and concluded that the ordinance in question did little to further the interests claimed by the government. There has been no similar showing in the case at bar. In *Roberge*, the Court concluded that a governmental entity may not constitutionally delegate its entire zoning powers to the owners of adjoining land. Although the city council of Cleburne was heavily influenced by the opinions of adjoining landowners, it is abundantly clear that the city did not completely delegate its police powers. In sum, the Court concludes that the city's conduct was a proper and permissible exercise of its police powers.

4. Due Process — Vagueness

Plaintiffs also assail the Cleburne zoning ordinance on grounds that it is impermissibly vague. Noting that section 27 of the ordinance provides criminal penalties for its violation, Plaintiffs focus the Court's attention to the variance found in the two pertinent sections, §§ 8, 16, with regard to "home" and "hospital". Plaintiffs additionally offer the Court various hypothetical situations which could result in ambiguity under the city's zoning laws as a whole.

At the outset of its analysis, the court notes that on [R. Vol. I, p. 265] the facts of this case the ordinance does not "abut upon sensitive areas of basic First Amendment freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109, 33 L.Ed.2d 222, 228 (1972), [quoting *Smith v. Goguen*, 415 U.S. 556, 572-73, 39 L.Ed.2d 605 (1974)]. Accordingly the law does not demand the greater degree of specificity reserved for the protection of First Amendment freedom. *Parker v. Levy*, 417 U.S. 733, 41 L.Ed.2d 439 (1974). In fact, the ordinance in question is more appropriately characterized as an economic regulatory statute. The standard for its validity is set forth in *Parker, supra:*

> The stronge presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation.
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

417 U.S. 733, 757, 41 L.Ed.2d 439, 458 (1974) [*quoting United States v. Nat'l. Dairy Corp.*, 372 U.S. 29, 32-33,

9 L.Ed.2d 561 (1963)]. Under this limited standard of review the Court finds that the ordinance withstands constitutional assault. The Court has little to no difficulty in construing sections 8 and 16 to include the proposed group home despite the minor variance of terms ("home" v. "hospital") therein. A person of ordinary intelligence can reasonably understand [R. Vol. I, p. 266] that sections 8 and 16 require a special use permit for the operation of a for-profit group home for mentally retarded adults. Any ambiguity is minute.

On the facts of this case, it is beyond peradventure that Plaintiffs received clear and sufficient notice of the city's prohibitions. Accordingly, there is some doubt as to whether Plaintiffs may raise the vagueness claims, especially in the absence of an impingement upon First Amendment freedoms. *See Parker v. Levy*, 417 U.S. 733, 756, 41 L.Ed.2d 439, 458 (1974) (one to whose conduct a statute clearly applies may not successfully challenge it for vagueness). In any event, it is amply clear that the Court need not engage in speculation concerning hypothetical fact situations and their disposition under the ordinance. In short, the Court concludes that sections 8 and 16 of the ordinance are not impermissibly vague. The Court is reminded of the Supreme Court's opinion in *Grayned, supra* where it was stated that "condemned to the use of words, we can never expect mathematical certainty from our language." 408 U.S. at 110, 33 L.Ed 2d at 228-29.

5. Freedom of Association and Right to Travel

By these claims Plaintiffs would have the Court read much more into Defendants' conduct than the record reflects. Cleburne is merely exercising its inherent policy powers to approve or disapprove of the specific location of Plaintiffs' business endeavor. The city does not bar group homes for mentally retarded citizens from its jurisdiction and neither does it inhibit their rights to associate. In sum, mentally retarded citizens are free to live and associate in Cleburne, [R. Vol. I, p. 267] Texas. The city has merely pro-

hibited the establishment of a for-profit group home for 13 mentally retarded citizens at one specific location. As has been discussed above, the city has a significant and substantial interest in the ultimate location of the home. Plaintiffs' contentions are simply without merit.

D. Conclusions

The Court finds no statutory or constitutional infirmities in the Cleburne zoning ordinance, as written and as applied. Accordingly, judgment for Defendants on all claims will enter.

Signed and entered this 4th day of October, 1982.

/s/ Robert W. Porter
UNITED STATES DISTRICT JUDGE

[R. Vol. I, p. 268]

1. 31 U.S.C. § 1242(a) (1):

No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a state government or unit of local government, which government or unit receives funds made available under subchapter I of this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in section 794 shall also apply to any such program or activity. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or Title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program or activity.

2. 29 U.S.C. § 749: [sic]

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

[R. Vol. I, p. 269]

3. 31 U.S.C. § 1242(a) (2) (A):

The provisions of paragraph (1) of this subsection shall not apply where any State government or unit of local government demonstrates, by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with funds made available under subchapter I of this chapter.

[R. Vol. I, p. 270]

In The

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. CA3-80-1576-F

Cleburne Living Center, Et Al.

v.

City of Cleburne, Texas, Et Al.

JUDGMENT

This action came on for trial before the Court, Honorable Robert W. Porter, United States District Judge, and the issues having been duly tried and a decision having been rendered,

It is ORDERED and ADJUDGED that the Plaintiffs, Cleburne Living Center, Inc., et al., take nothing and that the action be dismissed on the merits.

Signed this 4th day of October, 1982.

/s/ Robert W. Porter

United States District Judge

CLEBURNE LIVING CENTER, INC., et al.,

Plaintiffs-Appellants,

v

CITY OF CLEBURNE, TEXAS, et al.,

Defendants-Appellees.

No. 82-1565.

United States Court of Appeals,

Fifth Circuit.

March 5, 1984.

Suit was brought challenging validity of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district." The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered judgment denying plaintiffs relief, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance could not be challenged under the Act, and (2) zoning ordinance was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis.

Affirmed in part and reversed and remanded in part.

1. United States — 82(2)

Zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" could not be challenged under the Act. 31 U.S.C.A. § 6716.

2. Constitutional Law — 213.1(2)

Three degrees of scrutiny are applied by courts in analyzing statutes challenged under equal protection clause: if a legislative classification disadvantages a "suspect class" or impinges upon exercise of a "fundamental right," then courts will employ strict scrutiny and statute must fall unless government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest; if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, it will be treated under intermediate scrutiny and satutory classification must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand such scrutiny; if neither strict nor intermediate scrutiny is appropriate, then statute will be tested for mere rationality. U.S.C.A. Const.Amend. 14.

3. Constitutional Law — 242.1(5)

Mentally retarded persons are a "quasi-suspect" class and laws discriminating against the mentally retarded should be given intermediate scrutiny. U.S.C.A. Const.Amend. 14.

4. Constitutional Law — 228.2

Zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis. U.S.C.A. Const.Amend. 14.

5. Constitutional Law — 42.2(2)

Organization which aimed to improve welfare and treatment of the mentally retarded, which never identified any individuals who actually desired to live in mental retardates' group home and which failed to prove a sufficient injury to its own interests, lacked standing to challenge constitutionality of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house

district" in its own right or as a representative of its members.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions. Thus, blacks were unable to disprove racist stereotypes so long as they were excluded from white neighborhoods and their children were isolated in segregated schools.

Moreover, the effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. Courts have carefully scrutinized legislation that discrimantes against politically impotent groups, for under those circumstances the danger is great that the statute will reflect and enshrine untrue stereotypes.

In the present case, we are faced with the isolation of just such a group — the mentally retarded, i.e. persons who possess certain learning disorders[1] but who are to be dis-

---

[1]As an expert, Dr. Phillip Roos, stated at trial:

> A: Essentially mental retardation is a problem of learning. It is manifested particularly in difficulty with abstract thinking, judgment and problem solving and includes social adjustment and economic productivity.

tinguished from the "mentally ill."[2] A zoning ordinance of Cleburne, Texas, excludes mental retardates' group homes from the permitted uses in the "apartment house district."

Q: How do you decide if a person is mentally retarded?

A: We use basically three criteria: Measured intelligence, adaptive behavior and medical classification.

. . . . . .

Q: Are there different degrees or levels of mental retardation?

A: Very definitely. There is a wide variability among retarded individuals. The mildest level of mental retardation, referred to as mild mental retardation, these are individuals whose intelligence is roughly between an IQ of 50 and an IQ of 70. This includes approximately eighty-nine percent of all mentally retarded people. Roughly nine out of ten mentally retarded people are mildly retarded.

Moderate mental retardation, IQ's of roughly 35 to 50, include six percent of the population. Severe mental retardation, IQ's 20 to 35, profound mental retardation, IQ below 20, these two categories combined include only about five percent of the population.

Trial Transcript at 137-38, 140.

[2]Dr. Roos also explained that mental retardation is not a mental illness.

Q: Is mental retardation a type of mental illness?

A: No, sir. It's an entirely different condition requiring entirely different approaches.

Q: Well, how do they differ?

A: Mental retardation is a problem of a deficit in intellectual development and social adaption. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.

Mental illness, on the other hand, is a disorder of thinking, of emotions and of behavior. It can occur anytime in life, often after a period of normal development. It is primarily a psychiatric, rather than an educational problem, and often it is reversible. That is, it is potentially curable in many cases.

Trial Transcript at 138-139.

The owners of a proposed group home challenged the ordinance under the Federal Revenue Sharing Act and the Equal Protection Clause of the Fourteenth Amendment. We reject the Revenue Sharing Act claim, because zoning was not a "program or activity" receiving federal funds. In evaluating the Equal Protection claim, we hold that mental retardates constitute a "quasi-suspect" class; and, therefore, we test the ordinance according to the "intermediate" level of scrutiny established by the Supreme Court. Because the city has failed to prove that the ordinance substantially furthers a significant governmental interest, we hold that the ordinance violates the Equal Protection Clause.

I. FACTS

In July, 1980, Jan Hannah purchased a house at 201 Featherston Street in Cleburne, Texas. Hannah is the Vice President and part-owner of Cleburne Living Centers, Inc. ("CLC"), a Texas corporation organized for the purpose of establishing and operating supervised group homes for the mentally retarded. Hannah bought the Featherston house for the purpose of leasing it to CLC for the operation of a group home, classified as a Level I Intermediate Care Facility.

The home would house thirteen men and women who are mildly or moderately retarded. They would receive twenty-four hour supervision from CLC staff members, working eight-hour shifts. In addition to handling some cooking and cleaning, the staff would work with the mentally retarded residents to train them in such skills as "kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities."[3] An interdisciplinary team of staff workers would prepare an indi-

---

[3] *Cleburne Living Center v. City of Cleburne*, No. CA 3-80-1576-F, slip op. at 7, Finding 23 (N.D.Tex. April 16, 1982).

vidualized program for each resident, based on his or her particular needs. The residents would have jobs in the community and in a work activity center. They would probably not have private cars. Their stay at the home would be voluntary, and the length of the stay indeterminate.

As a Level I Intermediate Care Facility, the Featherston home would be subject to extensive regulations and guidelines established and administered by the United States Department of Health and Human Resources, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health. CLC plans to comply with all applicable and valid statutes, regulations, codes, and ordinances. *Cleburne, supra* note 3, at 6, Finding 20.

For mentally retarded persons living in the 1980's, the existence of group homes is critical to assimilation into the normal culture. As the trial court found,

> Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne Living Center v. City of Cleburne, supra note 3, at 9, Finding 30. At present, there are no group homes or hospitals for the mentally retarded in Cleburne. One is located in Keene, Texas, approximately 15 minutes by automobile from Cleburne.

II. THE ORDINANCE

Section 8 of Cleburne's zoning ordinance lists the permitted uses in a district zoned R-3:

1. Any use permitted in District R-2.
2. Apartment houses, or multiple dwellings.

3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels.
6. *Hospitals*, sanitariums, nursing homes *or homes for* convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
8. Philanthropic or eleemosynary institutions, other than penal institutions.
9. Accessory uses customarily incident to any of the above uses. . . .

Id. at 4, Finding 12 (emphasis added).

Section 16, subdivision 9, of the same ordinance requires that special use permits be obtained for "*hospitals for the* insane or *feeble-minded*, or alcoholic or drug addicts, or penal or correctional institutions" that are to be operated anywhere in the city. *Id.* at 5, Finding 13 (emphasis added). Because the Featherston house is located in an R-3 zone and, more generally, because it is located anywhere within Cleburne, its use as a group home is not automatically permitted but requires a special use permit from the Cleburne City Council. Under the zoning ordinance, each special use permit is valid for only one year; so the owners of the Featherston house would have to reapply year after year.

III. PROCEEDINGS BELOW

On July 28, 1980, Hannah applied for a special use permit. The Cleburne Planning and Zoning Commission held a hearing and denied the permit. On October 14, 1980, the City Council of Cleburne held a public hearing on the permit application and again voted (3-1) to deny the permit. The Council members considered the following factors:

1. the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston;

2. the location of a junior high school across the street from 201 Featherston;

3. concern for the fears of elderly residents of the neighborhood;

4. the size of the home and the number of people to be housed;

5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

6. the home's location on a five hundred (500) year flood plain; and

7. in general, the presentation made before the City Council.

After exhausting administrative remedies, Hannah and the CLC sued for injunctive relief and damages, in the United States District Court for the Northern District of Texas. They were joined by the plaintiffs Johnson County Association for Retarded Citizens (JCARC) and Advocacy, Inc. in asserting the constitutional rights of mentally retarded persons who were potential residents of the facility. JCARC is an organization that aims to improve the welfare and treatment of the mentally retarded. Advocacy, Inc. is a nonprofit corporation that provides legal services to developmentally disabled persons.

The defendants in the suit include the City of Cleburne and individual city employees and council members. After a bench trial, the district judge entered judgment denying the plaintiffs relief on each of the grounds they had claimed. This appeal follows.

IV. ISSUES ON APPEAL

The plaintiffs raise various challenges to the zoning ordinance on its face and as applied. They argue, first, that the ordinance and the special use permit denial violate the Revenue Sharing Act which prohibits discrimination against "otherwise qualified" handicapped people. 31 U.S.C.

§ 1242(a) (1) (1982), *recodified* at 31 U.S.C.A. § 6716(b) (2) (1983).

The plaintiffs also claim that the ordinance and its application violate the Equal Protection and Due Process clauses of the Constitution.[4] We find the Revenue Sharing Act claim unconvincing in the circumstances of this case. However, we hold that the Cleburne ordinance, both on its face and as applied, denies equal protection. Therefore, we need not address the other constitutional claims. The one tangential issue that is worthy of note is the defendants' argument that JCARC lacks standing to prosecute this suit. Given the specific facts of this case, we agree. That determination does not affect our decision on the merits, however, for the other plaintiffs remain in the suit.

V. REVENUE SHARING ACT

[1] The plaintiffs argue, first, that the zoning function of the Cleburne City Council is within a "program or activity" subject to the provisions of the Revenue Sharing Act. 31 U.S.C.A. § 6716 (1983). We disagree. As the trial court held, clear and convincing evidence proved that federal funds were not used to finance the zoning activities of the City Council. *See* 31 U.S.C.A. § 6716(c) (1); *see also North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926, 72 L.Ed.2d 299 (1982) ("program or activity" language in Education Amendments of 1972 makes their coverage program-specific); *Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir.1981) (receipt of federal financial assistance by

---

[4]The plaintiffs assert that the ordinance violates Due Process in two ways. The distinctions drawn in the statute are allegedly arbitrary and capricious, thus failing to meet the minimal rationality requirements set out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). Moreover, the plaintiffs allege that the statute is unconstitutionally vague. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

multiprogram entity, for application to certain programs or activities, does not bring entire entity within the reach of Section 504 of the Rehabilitation Act); *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir.1969) (multiple programs in Title VI context).

The plaintiffs claim, however, that the City Council itself is an activity receiving federal funds, because it decides which specific city programs will ultimately receive the monies. Therefore, every action of the City Council (including zoning) is subject to the requirements of the Revenue Sharing Act. *Cf. Grove City College v. Bell*, 687 F.2d 684 (3d Cir.1982), *cert. granted* ..... U.S. ....., 103 S.Ct. 1181, 75 L.Ed.2d 429 (1983) (entire college a "program or activity" in Title IX case). We are not willing to make that leap in the circumstances of the case. Even if we assume that the City Council's function in disbursing funds subjected those decisions to the Revenue Sharing Act, there was no apparent link between that function and the Council's function in making zoning decisions. These were two entirely separate powers and should be considered separate programs.

We do not hold that a City Council could *never* be a single program or activity. We merely hold that those conditions do not exist in this case.[5]

VI. EQUAL PROTECTION

[2] The real problem with the Cleburne ordinance is that it denies equal protection both facially and as applied. In recent years, the formulaic analysis of Equal Protection

---

[5]This case is distinguishable from *Grove City College, supra,* where the college was considered a single "program or activity" under the Educational Amendments of 1972 because students received federal tuition aid. The aid, which was not earmarked for any specific program, 687 F.2d at 696-97, would conceivably have ultimately funded every program in the college; but the case reveals no attempt by the school to prove that certain programs were not funded. Instead, the college argued that the funding was indirect, going to students rather than any program of the college itself. *Id.*

claims has produced three degrees of scrutiny for courts to apply in analyzing challenged statutes. The levels are generally called "strict scrutiny," "intermediate" or "heightened" scrutiny, and "rational review," *see Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394-96, 72 L.Ed.2d 786 (1982); the choice among the three levels depends upon the nature of the statute in question. If the legislative classification disadvantages a "suspect class"[9] or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny. *Plyler v. Doe, supra*, 102 S.Ct. at 2394-95 and nn. 14, 15. The statute must fall unless the government can demonstrate that the "classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 2395.

If the "classification, while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties," *id.*, it will be tested under intermediate scrutiny. Such difficulties arise, for example, when a statute discriminates against a class which shares some of the characteristics of the suspect classes. *See id.* at 2395-97; *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S. Ct. 1459, 1463, 52 L.Ed.2d 31 (1977); Tribe, *American Constitutional Law*, 1090 (1978). To withstand intermediate scrutiny, the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976); *see also Plyler v. Doe, supra*, 102 S. Ct. at 2395, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality. We "seek only the assurance that the classification at issue bears

---

[9]The courts have identified a number of classifications as inherently suspect. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (classification by race); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage).

some fair relationship to a legitimate public purpose." *Plyler v. Doe, supra,* 102 S.Ct. at 2394.

[3] In deciding the appropriate level of scrutiny in this case, we note that the plaintiffs have identified no fundamental rights that are impaired by the Cleburne ordinance. Our analysis, then, is limited to whether the class of mentally retarded persons is suspect or at least possesses sufficient characteristics of a suspect class to warrant intermediate review.

Although some district courts have discussed this issue,[7] we can find no appellate opinions directly deciding the proper characterization of mentally retarded persons for Equal Protection analysis.[8] Therefore, we face the issue as one of first impression.

The courts have identified several indicia of the suspect classes. In *San Antonio Independent School District v.*

---

[7]See *Association for Retarded Citizens of North Dakota v. Olson,* 561 F.Supp. 473, 490 (D.N.D. 1982) (intermediate scrutiny appropriate for classification discriminating against mentally retarded persons); *Fialkowski v. Shapp,* 405 F.Supp. 946, 957-59 (E.D.Pa. 1975) (same) (dictum); *cf. Frederick L. v. Thomas,* 408 F.Supp. 832, 836 (E.D.Pa.1976) (classification discriminating against learning disabled should be tested under intermediate scrutiny) *(dictum). But see New York State Assoc. for Retarded Children v. Rockefeller,* 357 F.Supp. 752, 762 (E.D.N.Y.1973) (inmates of state institution for mentally retarded not a suspect class); *Developmental Disabilities Advocacy Center v. Melton,* 521 F.Supp. 365, 371 (D.N.H. 1981) (same); *Anderson v. Banks, 520 F.Supp.* 472, 512 (S.D.Ga. 1981) (mentally retarded persons not a "quasi-suspect" class). Some cases have discussed whether mentally *ill* persons are a suspect or "quasi-suspect" class. *See, e.g., Doe v. Colautti,* 592 F.2d 704, 710 (3rd Cir. 1979) (mentally ill not a suspect class); *Sterling v. Harris,* 478 F.Supp. 1046, 1056 (N.D.Ill.1979), *rev'd other grounds sub nom; Schweiker v. Wilson,* 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) (mentally ill a "quasi-suspect" class). However, mental illness is distinguishable in significant ways from mental retardation, as we discuss *infra* at note 10. Thus, the mental illness cases offer at best only weak analogies to the case at bar.

[8]*Romeo v. Youngberg,* 644 F.2d 147, 163 n. 35 (3rd Cir. 1981) *(en banc)* does suggest, however, that mentally retarded persons

Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973), the Supreme Court considered whether

> the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Accord, Plyler v. Doe, supra, 102 S.Ct. at 2394-95 n. 14; *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1964); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed. 1234 (1938). In *Plyler v. Doe, supra*, the Court also noted that

> [s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.

102 S.Ct. at 2394-95 n. 14.

Finally, if membership in the minority class is immutable, the Supreme Court is more likely to give the class special protection. *See Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269 (1979); *cf. Plyler v. Doe, supra*, 102 S.Ct. at 2396 (minor children of illegal aliens are not in this country voluntarily and, therefore, are not comparably situated to their parents).

---

might be a "discrete and insular" minority deserving heightened scrutiny. See *infra* at 14. *Cf. Abrams v. 11 Cornwall Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (discrimination against mentally retarded persons is invidious).

Applying these tests to the case at bar, we conclude that although mental retardates are not a suspect class, they do share enough of the characteristics of a suspect class to warrant heightened scrutiny. Discrimination against the mentally retarded is likely to reflect deep-seated prejudice. They have been subjected to a history of unfair and often grotesque mistreatment. Until the 1970s, they were universally denied admittance into public schools in the United States. In addition, the Eugenic Society of America fought during the first half of this century to have retarded persons eradicated entirely through euthanasia and compulsory sterilization. *See Pennsylvania Assoc. of Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294 (E.D.Pa. 1972). Euthanasia was rejected; but thirty-two states have had statutes providing for the sterilization of retarded individuals. *Id.* at 294 n. 42; *Falkawski v. Shapp*, *supra* note 7, at 959 n. 9; O'Hara & Sanks, Eugenic Sterilization, *45 Geo.L.J. 30* (1956); *see also Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (upholding Virginia compulsory sterilization law.)[9]

Mental retardates have been segregated in remote, stigmatizing institutions. *Cleburne Living Center v. City of Cleburne*, *supra* note 3, at 3, Finding 32, Trial Transcript at 142; and when permitted in society, they have often been subjected to ridicule, *id.* at 141. Once-technical terms for various degrees of retardation — e.g. "idiots," "imbeciles," "morons" — have become popular terms of derision.

These forms of mistreatment have perpetuated the historical misunderstanding of mental retardation and led to popular fears and uncertainty. The Cleburne ordinance

---

[9]The attitude of the past can be read in the words of Justice Holmes:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence . . . Three generations of imbeciles are enough.

Id. 274 U.S. at 207, 47 S.Ct. at 585.

discriminates between the mentally retarded and other groups — e.g. the elderly — that also require supervision but may establish group homes in the R-3 district without a special use permit. This distinction is likely to reflect the deep-seated historical prejudice against the mentally retarded.

In addition, mentally retarded persons have lacked political power. The trial court found that they "historically have been subjected to exclusion from the political process. . . ." *Cleburne, supra* note 3, at 9, Finding 32. Indeed, as of 1979, most states disqualified mentally retarded individuals from voting. Note, *Mental Disability and the Right to Vote*, 88 *Yale L.J.* 1644 (1979).[10] Furthermore, political organizations for the mentally retarded have emerged only recently and still possess relatively little power. As the Third Circuit declared in *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir.1981) (*en banc*):

> The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom

---

[10]In Texas, both the state constitution and election code provide: The following classes of persons shall not be allowed to vote in this state, to wit:

. . . . .

Second: Idiots and lunatics.

Tex. Const. art. VI, § 1; Tex.Elec.Code Ann. art. 5.01 (Vernon Supp 1982). A 1982 opinion of the Texas Secretary of State limited that language to mentally retarded persons who have been adjudicated incompetent. Election Law Opinion DAD-27 (1982). The opinion relied in large part on the Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann. art. 5547-300, § 2(c) (Vernon Supp. 1982).

We do not believe, however, that the mentally retarded have suddenly become politically powerful in Texas. They are still a relatively small bloc, notwithstanding the existence of organizations like the Johnson County Association of Retarded Citizens. Moreover, their right to vote was unclear as late as 1982. The Secretary of State opinion was necessitated by a local judge's decision to bar from the polls a mentally retarded person who had not been adjudicated incompetent. *Id.* The powerlessness of the minority is especially clear in our case, for the Cleburne Ordinance was passed in 1965, long before the Secretary of State Opinion or the Mentally Retarded Persons Act.

> the judiciary should exercise special solicitude. *Cf. United States v. Carolene Products*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 783-84 n. 4, 82 L.Ed.2d 1234 (1938). The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process. *See J. Ely, Democracy and Distrust*, 135-79 (1980).

Id. at 163 n. 35.

Finally, the mentally retarded deserve special consideration because their condition is immutable. Dr. Phillip Roos explained at trial that mental retardation is "irreversible." "[T]here may be some amelioration, but to date it is not a curable condition." Trial Transcript at 139.

The combination of these factors — historical prejudice, political powerlessness, and immutability — calls for heightened scrutiny of classifications discriminating against the mentally retarded. We are not prepared to say that they are a full-fledged suspect class, however. Strict scrutiny has been reserved for classifications, such as race, that "tend to be irrelevant to any proper legislative goal." *Plyler v. Doe*, *supra* 102 S.Ct. at 2394-95 n. 14. Though mental retardation is irrelevant to many policies, it *is* a relevant distinction in some cases. For example, learning difficulties may have a bearing on the types of school programs to which a child is assigned or the types of employment for which an adult is qualified. Therefore, we hold that mentally retarded persons are only a "quasi-suspect" class and that laws discriminating against the mentally retarded should be given intermediate scrutiny.[11]

---

[11]In deciding that classifications against the mentally retarded deserve heightened scrutiny, we express no view about classifications involving the mentally ill. Some courts and commentators have suggested that mentally ill persons are a suspect or quasi-suspect class. See, *e.g.*, *Sterling v. Harris*, *supra*, 478 F.Supp. at 1053; Note, *Mentally Illness: A Suspect Classification*, 83 Y.L.J. 1237 (1974); but *see Doe v. Colautti supra*. The Fifth Circuit has not addressed this issue, except to say in *dictum* that the mentally ill are not a suspect class. See *Benham v. Edwards*, 678 F.2d 511, 515

We note that heightened scrutiny is particularly appropriate in the case at bar, because the Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded. See *Plyler v. Doe*, *supra*, 102 S.Ct. at 2398; *Tribe*, *supra* at 1089-90. In *Plyler*, the Supreme Court addressed a Texas statute which withheld from local school districts any funds for the education of children who were not legally admitted into the United States. The statute also authorized local disricts to exclude such children from the public schools. 102 S.Ct. at 2389. The Court held that heightened scrutiny was appropriate not only because the children shared some of the characteristics of a suspect class, but also because they were denied an important benefit. Education is not a fundamental right, *id.* at 2397, *San Antonio Independent School District v. Rodriguez*, *supra*, 93 S.Ct. at 1297; but it is important in helping such children overcome the bias against them and participate in American society:

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic

---

n.9 (5th Cir. Unit B 1982). The Court explicitly declined to decide whether intermediate scrutiny would be appropriate. *Id.*

In any event, mental retardation is functionally different from mental illness; see *supra* note 2; and the differences cut in favor of heightened scrutiny for the retarded. Mental retardation is not an emotional disorder but a learning problem; it arguably invokes fewer safety concerns than does mental retardation. More important, mental retardation, unlike many mental illnesses, is an immutable disorder. Then mentally retarded cannot be cured. *Id.*

Finally, mental illness covers a broader spectrum of disorders and is more difficult to define than mental retardation. The court in *Doe v. Colautti*, *supra*, 592 F.2d at 711, refused to grant extraordinary protection to the mentally ill:

> a class that is "large, diverse, [and] amorphous. . . ." The concept of mental illness is susceptible to much dispute, and the category encompasses a whole range of disorders, varying in character, and effects.

Mental retardation is much more narrowly defined. See *supra* note 1.

> possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

102 S.Ct. 2398.

In the same way, the exclusion of group homes from Cleburne operates to prevent mentally retarded persons from assimilating into and contributing to their society. The trial court found that

> [g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Cleburne, supra at 9, Finding 30. Isolated from normal community patterns, they can never hope to adapt. The resulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

The Ninth Circuit has held in an analogous case that heightened scrutiny is appropriate. *See J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir.1983). The Court reviewed a local zoning ordinance that required a special use permit before the establishment of a group home for former mental patients[12] in the R-2 zone.[13] Intermediate scrutiny was held

---

[12]We are not suggesting that former mental patients are identical to the mentally retarded. *See supra* notes 2, 11. However, many of the problems (e.g. the community's fear and distrust) that face mental patients in returning to society are similar to problems faced by the mentally retarded.

[13]The Tacoma ordinance was arguably less problematic than the Cleburne ordinance, because the Tacoma law provided specific conditions for the issuance of a permit. See *id.* at 1130 n.5. The Cleburne ordinance has no guidelines at all.

to be applicable because the class shared some of the characteristics of suspect classes and because the ordinance denied important benefits:

> We note . . . that the benefits the ordinance restricts are the former mental patients' access to housing and rehabilitative services. While they are not fundamental rights, they like education at issue in *Plyler*, are essential to individuals' full participation in society. Indeed, for former mental patients, a reintegration into society accomplished through living, in a moderately structured setting in a residential neighborhood is an essential part of therapy.

Id. at 1129.[14]

For the same reasons, we think that intermediate scrutiny is particularly appropriate in reviewing an ordinance[15] that restricts the availability of group homes for the mentally retarded.

---

[14]Incidentally, although the court relied on these arguments to apply heightened scrutiny, it explicitly left open

> the possibility that, in a case with a record more fully developed as to the characteristics and status of former mental patients, a conclusion that they indeed constitute a suspect class might be warranted.
> *Id.* at 1129.

[15]The City has argued that the statute does not actually exclude all such group homes but merely requires one additional procedural hurdle. In effect, there is only a possibility of exclusion. Arguably, than we should not adopt heightened review in testing the *facial* validity of the statute as opposed to its application.

Yet the same possibility *obtained* in both *Plyler* and *City of Tacoma*. The Texas Ordinance in *Plyler* authorized but did not require local school districts to exclude undocumented children. Indeed, the Tyler Independent School District had enrolled such children free of charge until 1977 when it required a tuition fee. 102 S.Ct. at 2389 n. 2. The Court tested the provision, however, with more than minimal scrutiny because of the potential exclusion.

More to the point, the zoning ordinance in *City of Tacoma*, like the Cleburne Ordinance, did not exclude all group homes but merely required a special use permit. The Ninth Circuit tested the statute under intermediate scrutiny again because of the possible denial of an important benefit.

Thus, the possible exclusion here is sufficient to justify our considering the importance of the restricted benefit when we analyze the statute on its face.

[4] In applying that test, we hold that the ordinance is unconstitutional both on its face and as applied. First, the provision itself does not substantially further any important governmental interests. The problem lies not with the interests themselves but with the relevance of the ordinance to those interests. We will assume that all of the legislative goals asserted by the City of Cleburne are substantial. In each instance, however, there is not a sufficiently close correspondence between the goal and the ordinance's means of achieving it. *See Craig v. Boren, supra,* 429 U.S. at 197, 200-204, 97 S.Ct. at 460 (requiring closer fit between legislative objective and statutory means than is required under rational review); Tribe, *supra* at 1083 & n. 10 (same); *see also Trimble v. Gordon, supra,* 430 U.S. at 770-71, 97 S.Ct. at 1465-66; *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 1904 n. 20, 1911 n. 48, 48 L.Ed.2d 495 (1976); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 799-80 n. 13, 39 L.Ed.2d 52 (1974). The standardless requirement of a special use permit for all group homes for the mentally retarded is both vastly overbroad and vastly underinclusive.

For example, the City claims that the objectives of the statute were:

1. to avoid undue concentrations of population;

2. to lessen congestion in the streets;

3. to ensure safety from fire and other dangers; and

4. to protect the health, safety and welfare of the City's population — in particular

   a. to protect the serenity of the existing neighborhoods,

   b. to protect neighbors from harm; and

   c. to protect the mental retardates themselves by providing an appropriate living environment.

See Brief of Appellees at 21-24.

The ordinance is irrelevant to the achievement of the first two asserted objectives. The same house with the same

number of occupants would be a permitted use so long as the occupants were not mentally retarded. *Cleburne*, *supra* note 3 at 7, Finding 24. Therefore the ordinance does not control population at all. It merely controls the learning skills of the population.

The ordinance likewise does not control traffic flow. The government has not shown that mentally retarded persons drive more cars or receive more visitors than other people. There is no basis for concluding that traffic will be any more congested because the residents of the Featherston house are mentally retarded. One might argue (though the City has not taken this position) that traffic would be more congested because mentally retarded persons would wander into the streets. Other people do the same, however; and there is no evidence in the record that mentally retarded persons are unusually prone to cause such a hazard. We reject traffic congestion as a goal that is furthered by the ordinance.

The record also fails to support the claim that the ordinance protects the serenity of neighborhoods and shields neighbors from harm. The City produced only one story of a mentally retarded person who had caused a disruption: he had removed some mail from a neighbor's mailbox but later returned it. Moreover, this event did not even take place in Cleburne. *See* Trial Transcript at 111. Nothing in the record indicates that mentally retarded persons — and particularly those admitted into group homes — are more disruptive or dangerous than other people. On the contrary, Dr. Roos testified that the mailbox incident was not common behavior in moderately retarded persons and was just as possible in most children. *Id.* at 164. Yet public schools and homes for delinquent children are permitted in the zone. The discrimination between the mentally retarded and other persons is not explained by recourse to neighborhood serenity.

Finally, as to "safety from fire and other dangers," the City does not clarify whether mentally retarded persons

will cause the dangers or require special city services when accidents occur. In either event, the City has not proved a substantial relationship between the goal and the ordinance. There is no evidence in the record that mentally retarded persons are more likely than other people to light fires (or cause other hazards). It is conceivable that they might require special care in an emergency. However, the City has never shown that they require more supervision than groups like the elderly whose nursing homes are permitted in the R-3 zone without permits. Nor has the City shown that the existing supervisors in the Featherston house would provide inadequate care. To treat all homes for the mentally retarded as non-permitted uses is an excessively blunt instrument for achieving fire safety. The City could more appropriately solve this problem by requiring a certain number of caretakers per resident or by setting limits on occupancy. Such requirements already exist in federal and state regulations. *See Cleburne, supra* note 3, at 6, Finding 20. There is no reason why the City cannot be more specific in delineating its concerns.

The same objection can be raised to the City's general claim that the ordinance serves to protect the health, safety, and welfare of mentally retarded persons — by insuring, for example, that group homes are well constructed, safely located, and not over-crowded. The City could serve these interests in a much more direct manner by setting specific requirements to guide the judgment of the City Council. The alternative (embodied in the Cleburne ordinance) of giving the city council complete discretion to bar all group homes is too dangerous. There is too great a potential for blanket discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home. We cannot sanction such unbridled discretion in dealing with a class that has suffered a history of mistreatment and political impotence. The Cleburne provision requiring a special use permit for mental retardates' group homes is facially invalid under the Equal Protection Clause.

That holding alone would be sufficient to decide this case. The ordinance provision was unconstitutional; therefore it could not be invoked to exclude the Featherston Home. However, even if the statute were facially constitutional, the City Council's decision in this case would have violated equal protection. Again, the decision must be tested under intermediate scrutiny; and we hold that the denial of a permit for the Featherston Home did not substantially further any important government interest justifying the discriminatory classification.

The factors going into the Council's decision were:

(a) the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;

(b) the location of a junior high across the street from 201 Featherston;

(c) concern for the fears of elderly residents of the neighborhood;

(d) the size of the home and the number of people to be housed;

(e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

(f) the home's location on a five hundred (500) year flood plain; and

(g) in general, the presentation made before the City Council.

Cleburne, supra note 3, at 9-10, Finding 34.

The final factor (g) is too ambiguous to justify discrimination; and two more (a and c) do not serve substantial interests. The prejudices and fears of neighbors are not in themselves ligitimate bases for discrimination.

The location of a junior high across the street from the Featherston Home (factor b) raises an arguable concern

that the students would tease or abuse residents of the home. However, that danger seems minimal, since about thirty students are themselves mentally retarded. *Cleburne, supra*, note 3, at 6, Finding 21. More important, the very purpose of living in a community group home is to confront and learn to handle society's obstacles. If we accept that the hostility of junior high students is a substantial concern, then any hostility may become the justification for denying a use permit. In effect, prejudice becomes its own excuse. We cannot accept that as a substantial interest, particularly given the speculative, unsupported nature of the City's allegations.

The size of the home and the number of people to be housed are important interests; but they are not substantially served by denying the permit in this case. The Featherston Home has four bedrooms and two baths and will house thirteen people. The structure contains 2700 square feet and is located on a lot that is 156 feet long by 103 feet wide. Citing a recent Texas regulation that limits group homes to six residents, the City argues that residents of the Featherston Home will be too crowded. The regulation only applies to applications made after May 1, 1982 and, therefore, does not govern the Featherston Home; but the City feels that the regulation indicates the needs of mentally retarded persons. However, the existence of the rgulation does not explain Cleburne's discrimination between the mentally retarded and others. The City never justifies its apparent view that other people can live under such "crowded" conditions when mentally retarded persons cannot. Moreover, assuming that the City would be comfortable with six residents, it has never justified the difference between six and thirteen persons. The only discussion of this question came from Dr. Roos who knew of "no research evidence indicating that a group home with six does a better job than a group home with fifteen." Trial Record at 161. In sum, the City has never proven that the mentally retarded have unusual space needs or that denying the Featherston permit serves that interest.

The stated goal of insuring CLC's legal responsibility for the actions of its residents is not sufficiently important. Nowhere in the briefs or the record do we find an explanation why mental retardates alone must prove their financial solvency to live in Cleburne. Nor do we find any explanation of how CLC fell short.

Finally, the argument that the Home would be in a 500 year flood plan seems somewhat strained. Though the safety of the residents is important, the danger of a flood every five hundred years is not particularly great.

In sum, none of the proffered reasons for denying the Featherston permit substantially served an important government interest. The application of the ordinance denied equal protection.

VII. STANDING OF JCARC

[5] The Johnson County Association of Retarded Citizens has asserted standing to litigate this suit in its own right and as a representative of its members. The trial court held that the association had failed to prove any injury to itself or to its members. Therefore, it failed to satisfy the requirements for standing.

We affirm, for the reason given by the trial court. The JCARC has not shown any injury to its members. Although it claims that some of its members are potential residents of the Featherston Home, it has never identified any individuals who actually desire to live there. Thus, it is impossible to tell if any of the members were actually harmed by the City Council's action. *See Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

Nor has the JCARC proven a sufficient injury to its own interests. The association's activities include "promoting the general welfare of mentally retarded people, fostering the development of programs on their behalf, and advising and aiding parents of mentally retarded persons in the solution

of their problems in this area." Brief of Appellant at 3. In particular, the JCARC favors the development of group homes; and the City Council's decision allegedly impairs this interest. However, the association's interest seems no different from that of the low-income housing association denied standing in *Warth v. Seldin, supra.* The injury to the JCARC's "abstract social interests" is too intangible to justify standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

The association would have standing if it proved that (1) it provides counseling and referral services for mentally retarded persons seeking group homes, and (2) it has had to devote significant resources to combatting the City Council's discrimination. *Id.* However, it has not yet proven any drain on its resources, so it does not come within the *Havens* formula.

In future cases, the JCARC can put forth evidence proving such an injury, or it can show that one of its members actually desires to live in the contested group home.[18]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

---

[18]Admittedly, we have provided the JCARC with a formula for establishing standing in its future litigation. There is high precedent for giving such advice. See *Sierra Club v. Morton, supra*, 92 S.Ct. at 1366.

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs-Appellants,

v.

CITY OF CLEBURNE, TEXAS, et al.,
Defendants-Appellees.

No. 82-1565.

United States Court of Appeals, Fifth Circuit.

July 6, 1984.

Renea Hicks, Advocacy, Inc., Austin, Tex., for plaintiffs-appellants.

Earl Luna, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1984, 5 Cir., 1984, 726 F.2d 191)

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge, with whom BROWN, GEE, REAVLEY, JOLLY and DAVIS, Circuit Judges, join, dissenting.

I respectfully dissent from the denial of a rehearing en banc.

The panel has made a holding no other federal appellate court has: that state regulations treating the mentally retarded differently than others are on that account facially invalid if they fail to meet the "intermediate" or "heightened" scrutiny test applicable to classifications such as those based on gender or legitimacy, notwithstanding that the regulatory distinctions in question are rationally based and impair no fundamental right.[1] I believe this holding not only to be significantly wrong, but also, due to its exceptional importance and novelty, to clearly deserve our en banc consideration.

It is both a cliche and a fundamental truth that equality does not demand treating materially different conditions in the same manner. Hence, where fundamental rights are not concerned, a threshold requirement for scrutiny beyond the rational basis level should be that the group singled out for special treatment be not generally, or with respect to the field of regulatory subject matter under consideration, significantly different, as a result of its defining characteristics, from the rest of society in terms of its needs and abilities to function. Where difference in treatment should rationally be expected, it is indeed an ill-advised rule that treats its presence as quasi-suspect.

Classification based on mental retardation is generically different from that based on gender or legitimacy, the prototypical "quasi-suspect" classifications. Under the broadly held and judicially accepted view, women and illegitimates are not generally different from the rest of society in terms of their needs and abilities to function. Women have as much need for, and ability to benefit from, the same kinds

---

[1]The district court held the regulatory distinctions here at issue to be rationally based. The panel did not reach that question, and hence neither does this dissent, which is directed only to the rule announced by the panel. The panel likewise held there was no impairment of fundamental rights.

of education as men,[2] and illegitimate children have as much need for, and can equally benefit from, parental support as legitimate children. Thus, for example, governmental distinctions between the sexes respecting education, or between legitimate and illegitimate children respecting the obligation of parental support, are quasi-suspect. The mentally retarded present a wholly distinct situation.[3] They *are* materially different from the rest of society, and are so as a result of their class-defining characteristics.

The characteristics which define the retarded as a class — the presence from birth or early childhood of an incurable, though ameliorable, significant deficit in intellectual development and social adaptation — bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions, and are highly relevant to proper legislative goals in most respects.

And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill. This, of course, was recognized by plaintiffs' expert in the present case in his testimony quoted in the panel opinion (note 12) that mental retardation and mental illness are "conditions requiring entirely different approaches." It is likewise obvious that entirely different approaches are also required in respect to the retarded and

---

[2]The same may be said with respect to legal and illegal alien children.

[3]As observed in *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973):

> ". . . what differentiates sex from such *nonsuspect statuses* as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the *sex characteristic frequently bears no relation to ability to perform or contribute to society.*" (Empasis added.)

the very young, or the very old, or the physically ill. Clearly that, too, is recognized by the plaintiffs here, who seek to create an environment *restricted* to and specifically designed for the retarded. Plaintiffs here do not want a children's day-care facility or a hospital. The retarded, *as such*, are not hospitalized or placed in nursing homes. In short, the retarded, often with minds at or below third-grader level in the bodies of otherwise relatively healthy adults, present a *special* set of needs, requirements, and problems unique to their condition.

As "entirely different approaches"are required respecting the retarded, are we nevertheless to treat the presence of difference in approach as "quasi-suspect"? It is entirely too facile to suggest that we do so only when the difference disadvantages the retarded. Is it an "advantage" or a "disadvantage" to be under twenty-four-hour supervision by professional staff (as the panel opinion reflects is the plan for the proposed facility here)? That may often depend on whether or not the person supervised is retarded. If so, the issue is not so much one of equality, but of *entitlement* to special, particular treatment. Moreover, some may think a given distinction helpful to the retarded, others not. Is the decision to apply "heightened" scrutiny dependent on whether the majority of "experts" think the distinction helpful to the retarded? Are all states frozen in the current "majority" view? If so, is innovation then "quasi-suspect"?[4] Are we to review as "quasi-suspect" the failure of govern-

---

[4]In Justice Brandeis' famous words: "Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting). The panel opinion appears to regard the integrative model as the preferred method of aiding the retarded. *See* At 199 ("Isolated from normal community patterns, they can never hope to adapt."). Are other models constitutionally "quasi-suspect"?

mental facilities for the retarded to have every item of equipment or design characteristic found in municipal hospitals or to require staff educational attainments mandated for the hospitals? How are funding levels to be compared? Obviously, these observations suggest only the smallest fraction of the myriad of areas in which governmental practices may distinguish between the retarded and the nonretarded, but where judgment as to the constitutional validity of a given distinction made on that basis is not meaningfully aided by asking whether the distinction is advantageous to the retarded.

The factors relied on by the panel for its determination that the retarded are a quasi-suspect class[5] should not alone suffice for such purpose, absent the class' meeting a threshold level of lack of significant dissimilarity from the rest of society, arising from the class' defining characteristics, in terms of its member's needs and abilities to function, either generally or in respect to the regulatory area under consideration. The panel factors in no way mitigate the contradictory nature of "quasi-suspecting," as being unequal, the different treatment of conditions that are significantly different. Indeed, the panel factors tend to increase in strength with the degree of retardation and the concomitant increased appropriateness of disparate treatment.[6] Where

---

[5]The factors cited by the panel (At 197-98) may be summarized as follows: (1) "likely to reflect deep-seated prejudice"; (2) "history of unfair and often grotesque mistreatment," including "universally denied admittance into public schools" (until 1970's), segregation "in remote, stimatizing institutions," and "often been subjected to ridicule"; (3) "have lacked political power"; (4) "their condition [through ameliorable] is immutable."

[6]I believe it fair to assume that, to the extent the public tends to react toward the retarded differently than toward the nonretarded, the differences in reaction are greatest with respect to those whose retardation is more pronounced, and least with respect to the marginally retarded (those with, say, an IQ at or only slightly below 70). Certainly, the marginally retarded are far more likely to attend public schools, and far less likely to be "in remote,

the need for greater differences in treatment is most evident — the severely and profoundly retarded — the classification is the most suspect.

State regulations will inevitably often distinguish between the retarded and others. To invalidate these distinctions where they are rationally grounded and do not impair fundamental rights, on the basis of the same test that we use to invalidate distinctions based on gender, constitutes in my view a major and unwarranted extension of federal judicial power, to the substantial prejudice both of the judicial function and the principles of federalism. The unprecedented rule announced by the panel tells us, I fear, significantly more about the institutional powers of the federal judiciary than it does about the proper state treatment of the retarded. Before we thus expand our own powers I believe the states, and those charged with the legislative and executive functions, should at least be afforded a review en banc.

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom JOHN R. BROWN, Circuit Judge, joins, specially concurring in the dissent:

I join the dissent from the denial of en banc rehearing. I share the concerns so well expressed by Judge Garwood's dissent, but it is not necessary to reach a final judgment without the benefit of oral argument and collegial effort and I stop short of doing so. Only the case for en banc consideration need now be made and the dissent has done that. We have recently been willing to convene en banc solemnly to deliberate diversity cases whose vitality wholly depends on the next state court decision. *Sturgeon v. Strachan*

---

stigmatizing institutions," than those with more pronounced retardation. In terms of their ability to be trained so as to increase their social adaptive behavior to approach minimal levels necessary to function in society, the condition of the marginally retarded is certainly less "immutable" than that of those whose retardation is more pronounced. With respect to political power, the marginally retarded are more likely to vote (*see* panel opinion, note 10).

Shipping Co., 731 F.2d 255, 260 (5th Cir.1984) (en banc) (Rubin, J., dissenting); *Edwards Co. v. Monogram Industries, Inc.*, 730 F.2d 977, 987 (5th Cir.1984) (en banc) (Rubin, J., concurring). I am puzzled, then, that a case which implicates government's relationship with a uniquely insular minority and reexamines the relative roles of federal and state governments and their branches in their superintendence would not be deemed by a majority of this court worthy of en banc consideration.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1565

D. C. Docket No. CA3-80-1576 F

CLEBURNE LIVING CENTER, INC., et al.,

Plaintiffs-Appellants,

versus

CITY OF CLEBURNE, TEXAS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

MARCH 5, 1984

ISSUED AS MANDATE: JULY 16, 1984

U.S. District Court
Northern District of Texas
FILED
Aug. 27, 1984
Gilbert F. Ganucheau,
Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1565

CLEBURNE LIVING CENTER, INC., et al.,
Plaintiffs-Appellants,

versus

CITY OF CLEBURNE, TEXAS, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ORDER:

☐ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of appellees for ☐ stay ☒ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 27, 1984 the stay to continue in force until the final disposition of the case by the Supreme Court, provided

that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of .....
for a further stay of the issuance of the mandate is GRANTED to and including .....,
under the same conditions as set forth in the preceding paragraph.

☐ The motion of .....
for a further stay of the issuance of the mandate is DENIED.

CHARLES CLARK
CHIEF JUDGE

MDT-4

Office - Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-468

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

City of Cleburne, Texas, et al,

Petitioners,

vs.

Cleburne Living Center, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF BY THE FEDERATION OF GREATER BATON ROUGE CIVIC ASSOCIATIONS, INC.

Law Offices of Maughan,
Atkinson & Martin, Ltd.

Elliott W. Atkinson, Jr.
1755 Wooddale Boulevard
Baton Rouge, LA 70806
(504) 926-8533

Attorneys for The
Federation of Greater
Baton Rouge Civic
Associations, Inc.

QUESTIONS PRESENTED BY AMICUS CURIAE

1. Whether mentally retarded or mentally disabled individuals are entitled to suspect classifications or to special treatment as a group as opposed to individuals not mentally retarded under Equal Protection analysis.
2. Whether by Equal Protection analysis or by Article I, Section 10, Clause 1, analysis, legislation promoting treatment of mentally retarded can supersede local zoning ordinances and/or private deed restrictions.

LISTING OF PARTIES

PETITIONERS:

City of Cleburne, Texas
George W. Marti, Mayor of the City of Cleburne
J. T. Bass, Member of the Cleburne City Council
Arval Martin, Jr., Member of the Cleburne City Council
Lonnie Watson, Former Member of the Cleburne City Council, who resigned August 30, 1984 (Replaced Alfred Johns, deceased)
Rita Papajohn, Cleburne City Attorney (Replaced Susan McMillion, who replaced Robert T. Miller, Jr., who replaced Jim Ferguson)

ATTORNEYS FOR PETITIONERS:

Law Offices of Earl Luna, P.C.
Earl Luna
Robert T. Miller, Jr.
Mary Milford

RESPONDENTS:

Cleburne Living Center, Inc. (Now known as Community Living Concepts, Inc.)
Jan Hannah
Advocacy, Inc.

ATTORNEYS FOR RESPONDENTS:

Advocacy, Inc.
Renea Hicks
Diane Shisk

AMICUS CURIAE:

The Federation of Greater Baton Rouge Civic Associations, Inc.

ATTORNEYS FOR AMICUS CURIAE:

Maughan, Atkinson & Martin, Ltd.
Elliott W. Atkinson, Jr.

TABLE OF CONTENTS

	Page
Questions Presented	i
Listing of Parties	ii
Table of Contents	iv
Table of Authorities	vi
Constitutional Provisions Involved	1
Summary of the Argument	3
Argument	7
I. Mentally Retarded or Disabled Individuals Are Not Entitled to a Suspect Classification or Special Treatment Individually or as a Group as Opposed to Individuals Not Mentally Retarded	7
Least Restrictive Setting Does Not Mandate Single-Family Restricted Neighborhoods	11
Issue of Mentally Retarded as a Group is Entirely Different From Issue of Individual Rights	13

Page

II. State Legislation Overriding Local Zoning Ordinances On Behalf of the Mentally Retarded Cannot Be Supported by the Fourteenth Amendment or by Exercise of its Police Power; Overriding Private Deed Restrictions is an Overbroad Exercise of Police Power in Violation of Article I, Section 10, of the United States Constitution 19

Conclusion 28

Certificate of Service 30

TABLE OF AUTHORITIES

Cases	Page
Civitan Care, Inc., and Huntsville Group Homes, Inc., vs. Board of Adjustment of the City of Huntsville, 437 So.2d 540 (Ala. App. 1983)	25,27,28
City of Lafayette vs. Justus, 245 La. 867, 161 So.2d 747 (1964)	20
Donaldson vs. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated and remanded, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975)	10
Garcia vs. Siffrin Residential Ass'n., 407 N.E.2d 1369 (1980), cert. denied, 450 U.S. 911, 101 S.Ct. 1349 (1981)	24,25,28
Gary W. vs. State of Louisiana, 437 F.Supp. 1209 (Ed. La. 1976)	5,8,10,12,13
Griffin vs. Sharpe, 65 So.2d 751 (Fla. 1953)	24
Humphrey vs. Cady, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972)	9
Macon Association for Retarded Citizens vs. Macon-Bibb County Planning and Zoning Commission, 314 S.E.2d 218 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984)	26
Mugler vs. Kanoas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887)	20

TABLE OF AUTHORITIES- (Continued)

Cases	Page
Murphy vs. Gray, 84 Ariz. 299, 327 P.2d 751 (1958)	24
Pennhurst State School vs. Halderman, 451 U.S. 1, 67 L.Ed.2d 694, 101 S.Ct. 1531 (1981)	4,10,11,12,18
Richlawn vs. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950), cert. dismd., 340 U.S. 945, 71 S.Ct. 531, 95 L.Ed. 682 (1951)	24
Shelton vs. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)	13,14
Tucker vs. Special Children's Foundation, 449 So.2d 45 (La.App. 1st Cir. 1984)	19,20,23
Village of Belle Terre vs. Boraas, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974)	17,27
Village of Euclid vs. Amber Realty, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)	27
Wyatt vs. Aderholt, 503 F.2d 1305 (5th Cir. 1974)	10
Wyatt vs. Aderholt, 344 F.Supp. 373, 344 F.Supp. 387 (MD Ala. 1972)	12
Wyatt vs. Stickney, 325 F.Supp. 781 (MD Ala. 1971)	12

TABLE OF AUTHORITIES- (Continued)

CONSTITUTION	Page
U.S. Const. Article I, Sec. 10	i,1,6,19,20
U.S. Const. Amendment XIV, Sec. 1	1,11,19
FEDERAL STATUTES	
42 U.S.C. §600, et seq.	11
LOUISIANA CONSTITUTION	
Article I, Sec. 23	20
LOUISIANA STATUTES	
La. R.S. 28:380, et seq.	15
La. R.S. 28:381	15
La. R.S. 28:476	21,22
La. R.S. 28:478	22
ORDINANCES	
Title 7, Planning and Zoning, Sec. 2.101, Code of Ordinances, City of Baton Rouge, Louisiana, Parish of East Baton Rouge (1951), recodified October 12, 1983, at p. 800	15
OTHER AUTHORITIES	
Roberts, Can the Mentally Retarded Enjoy "Yards That Are Wide"?, 28 Wayne L. Rev. 1349 (1982)	19

NO. 84-468

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

City of Cleburne, Texas, et al,

Petitioners,

vs.

Cleburne Living Center, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF FEDERATION OF GREATER BATON ROUGE CIVIC ASSOCIATIONS, INC., AS AMICUS CURIAE

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution Article I, Section 10, Clause 1: "No state shall . . . pass any law impairing the obligations of contracts, ..."

U. S. Constitution, Amendment XIV, Sec. 1 (N): " . . . or shall any state . . . deny to any person within its jurisdiction the equal protection of the law."

CONSENT

The amicus curiae brief in support of petitioner is filed herein with the consent of both petitioner and respondent. The original written consents are filed with the Clerk of Court.

INTEREST OF THE FEDERATION OF GREATER BATON ROUGE CIVIC ASSOCIATIONS, INC.

The interest of The Federation of Greater Baton Rouge Civic Associations, Inc., is its representation of individual, single-family homeowners as opposed to special interest groups whose interests are pecuniary in nature. It is felt that the unorganized and otherwise unrepresented individual homeowners, who, in some cases, have invested life savings in a single-family dwelling located in a single-family neighborhood so restricted by local zoning ordinances and private deed restrictions, would not otherwise be

represented in this action. In support of the advancement of the mentally retarded and disabled are many well-organized national organizations which may desire to also file amicus curiae briefs resulting in a considerable imbalance and disadvantage to the individual American homeowner.

ISSUE SUBMITTED TO BE MISCONSTRUED

Whether mentally retarded and/or mentally disabled are entitled to special treatment as a group rather than individuals and thereby afforded greater rights than other citizens.

SUMMARY OF ARGUMENT

It is submitted that the establishment of mentally retarded persons by the Fifth Circuit of the United States Court of Appeals by judgment on March 5, 1984, in the above-entitled matter as a "quasi-suspect" class for equal protection analysis is misguided. If the Court were to have found that the

mentally retarded individual had been discriminated against by some history of purposefully unequal treatment, that would be a different matter.

However, the cases being litigated across the nation involve the right of several unrelated mentally retarded persons with in-house supervisory personnel to live as a group in single-family zoned or deed restricted areas, whereas a similar number of unrelated individuals not mentally retarded would be prohibited from so doing for recognized, rationally-based reasons.

Regardless of the genuine, good intentions of all concerned with the treatment and care of the mentally retarded or disabled, it must be questioned whether any type of disabled person has a constitutional right to the best treatment or care available or, in the present matter, to be placed in a group home in the least restrictive environment. Pennhurst State School vs. Halderman, 451 U.S. 1, 67 L.Ed.2d 694, 101 S.Ct. 1531 (1981). The cost burdens placed

on the states and the federal government could be beyond accurate estimate.

Placing as many mentally-retarded individuals as feasible and funds permit in the least restrictive environment appropriate for a given particular child does not mean that the rights of single-family homeowners in zoned and deed restricted areas must be set aside. Gary W. vs. State of La., 437 F.Supp. 1209, 1217 (1976). Both de-institutionalization of the mentally retarded to the extent possible and the sustaining of single-family zoned or restricted areas can co-exist by the selective placement of group homes in transitional areas allowing for multi-family zoning or in other residential areas that are not restricted by specific local zoning or deed restrictive language.

To allow states to pass laws that declare that six mentally retarded or disabled individuals with two live-in employees are a single family is to set aside the reliance on zoning ordinances or private contractual restrictions with set definitions of a

single-family, which, as commonly understood, exclude unrelated groups of any nature from their residential areas. In reliance thereon, individual homeowners have invested their life savings, with the faith that impairment of obligations of at least private contractual subdivision restrictions was protected by Article I, §10, of the U. S. Constitution. If such would be permissible, then the following year a legislature could designate 30 unrelated individuals, mentally retarded, mentally ill, or otherwise, as a single-family. The line must be drawn by affirming constitutional protection of private contractual restrictions as they now exist where such restrictions or ordinances do not discriminate against any given individual or particular group.

There is no basis to hold that the mentally retarded are to be granted a suspect or quasi-suspect classification. In the past, they were kept in predominantly large institutions not because of discrimination but because that was accepted as the best medical treatment at the time. If a more sound

medical treatment is now available through de-institutionalization, then it should be recognized simply as a "better" medical treatment. However, there is not a constitutionally protected right to such treatment that would allow the mentally retarded to live in areas where groups of any nature have otherwise been lawfully excluded.

ARGUMENT

I. MENTALLY RETARDED OR DISABLED INDIVIDUALS ARE NOT ENTITLED TO A SUSPECT CLASSIFICATION OR SPECIAL TREATMENT INDIVIDUALLY OR AS A GROUP AS OPPOSED TO INDIVIDUALS NOT MENTALLY RETARDED

The Federation of Greater Baton Rouge Civic Associations, in support of the brief and argument of the City of Cleburne, Texas, submits that a crucial point of analysis requires additional emphasis. In attempting to assign a "suspect" or "quasi-suspect" classification to the mentally retarded, there seems to be an underlying current or motivation to grant thereby greater rights than are possessed by the ordinary, normal citizen. Such reasoning is contrary to the very concept of the "Equal Protection Clause" of the United States Constitution.

In considering whether there has been any history of discrimination or purposeful unequal treatment for purposes of determining whether such would constitute a primary indicia of "suspectness," a two-part analysis should be made: (1) Whether any purposeful unequal treatment has existed toward the mentally retarded individual, and (2) whether any purposeful unequal treatment has existed or does exist toward mentally retarded when joined together in groups. Petitioner's brief adequately covers the four primary indicia of "suspectness," none of which are present in this matter which would require a special classification for constitutional protection above and beyond that possessed by any individual in this country.

Texas and Louisiana are uniquely connected to the problem of the mentally retarded and the "group home" issue through the case of Gary W. vs. State of Louisiana, et al, 437 F.Supp. 1209 (Ed. La. 1976). In Gary, the Court dealt with the well-being of numerous mentally retarded children from Louisiana that were being maintained in Texas facilities where

inadequate treatment, unnecessary long-term confinement, and neglect were alleged. The district court held that each child had a constitutional right to treatment that afforded him a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permitted with the demands of his own person and to raise the level of his physical, mental, and social efficiency.

The Court, in so speaking, was referring to individual rights, whether that individual was mentally retarded or not. The Court noted that involuntary institutional confinement of any person, adult or child, without question involved a substantial curtailment of liberty, citing Humphrey vs. Cady, 405 U.S. 504, 509, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972).

The Court further noted that the due process clause permits this kind of interference with the liberty of a human being only if it can be justified

by some permissible governmental interest, citing Wyatt vs. Aderholt, 503 F.2d 1305, 1312 (5th Cir. 1974); Donaldson vs. O'Connor, 493 F.2d 507, 520 (5th Cir. 1974), vacated and remanded, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed2d 396 (1975); Gary W., supra, at p. 1216.

In its reasoning, the Court in Gary W., supra, at pp. 1217, 1218, was itself consistent in recognizing the principle in Wyatt vs. Aderholt that no constitutional right exists to the best treatment available due to logic, economics, and the scarcity of human resources which make it impossible to supply the finest care to everyone. The treatment the state must provide to the best of its ability would simply be that treatment which is based on expert advise reasonably designed to effect the purpose of state action. This Honorable Court in Pennhurst State School vs. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), involving treatment of the mentally retarded, held that even where a program

involving federal funds existed under 42 U.S.C., §600, et seq., limitations existed on the power to force unlimited spending on any given program by a state. The Fourteenth Amendment was not found to serve as authority to require states to assume the high cost of providing "appropriate treatment" in the "least restrictive environment" to their mentally retarded citizens. At an average cost of $68.00 per person per day, the cost of providing treatment for only 180 individuals in 30 group homes could exceed $4,467,600.00 per year. This Court concluded that Congress itself intended to encourage rather than mandate better services to the developmentally disabled. Pennhurst, supra, at 451 U.S. 19, 20, 67 L.Ed.2d 708, 709. This Court itself expressed doubt as to what, in a given case, would be meant by "appropriate treatment" in the "least restrictive" setting. Id., 451 U.S. 25, 67 L.Ed. 712.

LEAST RESTRICTIVE SETTING DOES NOT MANDATE SINGLE-FAMILY RESTRICTED NEIGHBORHOODS

The problem being encountered nationwide is

essentially this concept of providing treatment in the "least restrictive setting," a concept created by the district court in Wyatt vs. Stickney, 325 F.Supp. 781, 784 (MD Ala. 1971) and Wyatt vs. Aderholt, 344 F.Supp. 373, 344 F.Supp. 387, 396 (MD Ala. 1972), which the Court in Gary W., supra, referred to in Louisiana's situation. However, in foreshadowing this Honorable Court's holding in Pennhurst, supra, the district court in Louisiana recognized that the imperative to employ the least drastic means possible when a person must be confined does not imply a constitutional right on the part of every individual to a personal judicial determination that the means employed to improve his condition are the best possible or least restrictive conceivable. What the court directed as being required was that a state give thoughtful consideration to the needs of the individual, treating him constructively and in accordance with his own situation, rather than automatically placing him in institutions. Gary W., supra, at p. 1217.

The Court in Gary W., supra, specifically held at p. 1216:

> Though the term "least restrictive setting" is more a slogan than a constitutional imperative, it does serve as a convenient way to sum up the standard applicable to all governmental restrictions on fundamental personal liberties, as set forth in Shelton vs. Tucker, (1960) 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231:
>
> . . . (E)ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose.

ISSUE OF MENTALLY RETARDED AS A GROUP IS ENTIRELY DIFFERENT FROM ISSUE OF INDIVIDUAL RIGHTS

It is emphasized by mover that all references are made to the rights of individuals and not groups. In preparing treatment plans for each child in Louisiana's situation, the Court in Gary W., supra, required that consideration be made for the least restrictive alternative for a given child but did not require the states to develop an entire new system of facilities. It is respectfully submitted that this

Honorable Court's statement in Shelton vs. Tucker, supra, equally applies to states in implementing programs and legislation for the mentally retarded.

Certainly government's purpose in encouraging improved care for the mentally retarded is legitimate and substantial; but does not the creation of legislative language making a number of unrelated mentally retarded with live-in staff, who in some cases are successive shift workers, a single family for purposes of overriding local zoning ordinances and private deed restrictions stifle fundamental personal liberties of the single-family homeowners across the nation? Across this nation, individuals have invested their life savings in a home, aptly termed "The American Dream." They did this with deed restrictions, covenants, and specifically zoned areas in mind, all of which they relied upon when they invested in a given area which restricted the use of the property to that of single-family residences. There never was any intention to restrict a mentally-retarded person from living in such an area. The

problem nationwide is the attempt to bypass local governments and their zoning ordinances or private deed restrictions by state legislatures' defining unrelated groups of mentally retarded as a single-family and thereby eliminating for appearance's sake any conflict with local zoning or covenants.

Louisiana's Mental Retardation Law, La. R.S. 28:380, et seq., would be typical of state legislative acts nationwide. At La. R.S. 28:381, a "community home" is defined:

> . . . community homes that provide for six or fewer mentally retarded or developmentally disabled individuals, with no more than two live-in staff, shall be considered single-family units having common interests, goals, and problems.

The City of Baton Rouge defines a single-family for purposes of planning and zoning in Title 7, Planning and Zoning, Section 2.101, Code of Ordinances, City of Baton Rouge, Louisiana, Parish of East Baton Rouge (1951), recodified October 12, 1983, at p. 800, which would also be typical of similar definitions nationwide:

> Family means an individual or two (2) or more persons who are related by blood, marriage, or legal adoption living together and occupying a single housekeeping unit with single culinary facilities; or not more than two (2) persons, or not more than four (4) persons (provided the owner lives on the premises) living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit, cost-sharing basis.

Organized proponents for the mentally retarded are not seeking to place mentally retarded in foster homes. If four individuals were placed with foster parents who owned the home and resided therein, there would be no conflict. However, in attempting to make the mentally retarded a suspect classification, greater rights are sought than exist for individuals not mentally retarded. They would seek a right for six unrelated, mentally-retarded persons with two live-in state employees to live in a single-family zoned area where eight unrelated persons not mentally retarded could not.

How many other groups --- mentally ill, drug abusers, prison parolees, etc. --- would also desire

special consideration as groups until the single-family zoned areas no longer exist. It is a genuine concern.

In Village of Belle Terre vs. Boraas, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974), this Honorable Court held a local ordinance not violative of constitutional rights where it restricted an area to single-family use, excluded lodging houses, boarding houses, fraternity houses, or multi-dwelling houses, and prohibited more than two unrelated persons from being a "family" under its definition.

The Court based its holding on the fact that the ordinance as applied:

(1) Was not aimed at transients and did not violate interstate travel rights.

(2) It involved no procedural disparity inflicted on some but not on others. In the issue before this Court, there is no procedural disparity on like number of mentally retarded but not others that would cause the granting of a suspect classification.

(3) No fundamental right guaranteed by the Constitution was involved. In the present matter, it has already been held that no fundamental right exists to the best possible treatment. Pennhurst State School vs. Halderman, supra.

(4) There existed there, as in the present matter and throughout Texas, Louisiana, and this nation, a reasonable, not arbitrary, permissible state objective to which the zoning ordinance bears a rational relationship. Zoning restrictions and private deed covenants restricting areas for single-family residential use are rationally related to a general plan of development to establish certain areas based on a given density and residential character. Groups are validly excluded with no discrimination or favoritism toward any suspect class of individuals or group.

It is submitted that even where a suspect class of individuals exist, such classification does not allow them to band together and locate as a group because of such classification where other individual

citizens as a group could not. Such would not be equality under the Fourteenth Amendment; it would be superior rights. In the thorough analysis in the brief submitted by the City of Cleburne, no basis exists for granting to the mentally retarded a "suspect" or "quasi-suspect" classification and thereby a uniquely superior right with which to shatter "The American Dream."

II. STATE LEGISLATION OVERRIDING LOCAL ZONING ORDINANCES ON BEHALF OF THE MENTALLY RETARDED CANNOT BE SUPPORTED BY THE FOURTEENTH AMENDMENT OR BY EXERCISE OF ITS POLICE POWER; OVERRIDING PRIVATE DEED RESTRICTIONS IS AN OVERBROAD EXERCISE OF POLICE POWER IN VIOLATION OF ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION

A recent case in Louisiana, Tucker vs. Special Children's Foundation, 449 So.2d 45 (La.App. 1st Cir. 1984), involving a preliminary injunction, is typical of the cases across this nation that are side-stepping the issue of protection of private contractual rights. See Roberts, Can the Mentally Retarded Enjoy "Yards That Are Wide"?, 28 Wayne L. Rev. 1349 (1982) for a general comparison of cases as well as other Law Review articles cited by petitioner. The

Court of Appeal in Tucker, supra, found that Article I, Section 23, of the Louisiana Constitution provides:

> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

Such is Louisiana's version of Article I, §10, of the United States Constitution, and most states would have similar provisions. However, the Court in Tucker, at p. 47, also held that the obligations of contracts and vested rights must yield to and cannot inhibit the proper exercise of the police power of the state, so long as that police power is exercised for such public end and is reasonably adapted to accomplish that end.

However, where a law exceeds the bounds of reasonableness, it violates due process of law. Mugler vs. Kanoas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed 205 (1887); City of Lafayette vs. Justus, 245 La. 867, 161 So.2d 747 (1964).

As in other instances enumerated in the many cases cited and in Texas, the intention of the state

to override local zoning ordinances or private deed restrictions for the "common good" is interpreted to be the legislature's defining a certain number of mentally retarded with live-in supervisors to be a single family.

The various states do not mandate a single-family area as a rule but allude only to the right to live in the least restrictive environment in their own community and in normal "residential" surroundings and should not be excluded therefrom because of their disabilities. La. R.S. 28:476, Tucker, supra, at 47.

It is crucial to this Honorable Court's determination of whether the mentally retarded are a suspect class as addressed in petitioner's brief that recognition be given that the mentally retarded are not excluded because of their disabilities. A group is being excluded where local zoning and private covenants are definitive in their language because they are a group; whether they are disabled or have no infirmities of any kind is not the real issue, the

exclusion is applied equally to all groups. Such practice is consistent with the language of the Act. La. R.S. 28:476.

The Mental Retardation Act in Louisiana had provided, aside from the single-family definition, for local control in La. R.S. 28:478:

> A. In order to achieve uniform statewide implementation of the policies of this Title and of those of the mental retardation law and of the mental health law, it is necessary to establish the statewide policy that community homes are permitting by right in all residential districts zones for multiple-family dwellings.
>
> B. The department shall establish appropriate standards with interpretative guidelines and establish monitoring procedures. In no case shall a community home be placed within a one thousand foot radius of another community home.
>
> C. The local sponsor shall notify the local governing authority of his intent to file an application to the department to open a community home. In any area over which a local planning commission has jurisdiction the site selection shall first be submitted to the local planning commission, which shall recommend approval or disapproval of the site to the local governing authority. The local governing authority shall then affirm or reverse the decision of the planning commission by a majority vote of its entire membership, within forty-five

> days of the date of the original notification to the local planning commission. In any area in which there is no local planning commission, the local governing authority shall approve or disapprove the site within forty-five days from the date of the original notification to the local governing authority. Whenever the local governing authority has disapproved the site, the local sponsor and the department may develop an alternate site selection for the community home which is acceptable to the local sponsor, the local governing authority, and the department.

In Louisiana, in Tucker, supra, the Court found that building restrictions stating that all lots contained in a subdivision were designated as residential lots and that no building should be erected to remain on any lots other than detached single-family dwellings was intended to apply not only to physical structure but also to the use to which the structure would be employed. However, the Court ruled such custom, intent, and long-settled practice inconsequential in that the legislature acted within its police power in stating that community homes housing six or fewer mentally retarded individuals with no more than two live-in staff shall be considered single-family units, and such exercise did not

impair the obligation of the subdivision resident's contract. Id. at 48.

It is submitted that this holding and reasoning is incorrect. It has been held that zoning itself cannot relieve property of lawful covenants without impairing contractual obligations. Richlawn vs. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950), cert. dismd., 340 U.S. 945, 71 S.Ct. 531, 95 L.Ed. 682; Murphey vs. Gray, 84 Ariz. 299, 327 P.2d 751 (1958); Griffin vs. Sharpe, 65 So.2d 751 (Fla. 1953).

In Garcia vs. Siffrin Residential Ass'n., 407 N.E.2d 1369 (1980), cert. denied, 450 U.S. 911, 101 S.Ct. 1349 (1981), the Supreme Court of Ohio dealt with the mentally retarded in context of home rule grants similar to some of Louisiana's parishes. The Court articulated the issue presented by this amicus curiae brief well at p. 1375:

> It may not be reasonably questioned that there is considerable merit in a law which seeks to maximize the assimilation of mentally retarded persons into the ordinary life of the community in which they live and to provide places for them to

> live in surroundings and circumstances as close to normal as possible. However, in carrying out these salutary state programs in aid of some of our citizens, the constitutional rights of other members of our citizenry and the constitutional authority which has been granted to our local governments must always be guarded and not infringed upon.

The Court in Garcia, at p. 1376, recognized common sense and custom in stating that such a facility and its statutorily mandated purpose and duties could not be likened to what is reasonably thought of to be a single housekeeping unit, rather it is a professional plan of rehabilitation. The nature of its operation could not constitute a "family" by the definition of the Canton, Ohio, zoning code.

The Court of Civil Appeals of Alabama dealt with the issue recently in Civitans Care, Inc., and Huntsville Group Homes, Inc., vs. Board of Adjustment of the City of Huntsville, 437 So.2d 540, (Ala.App. 1983). In Civitans, the Court dealt with a non-profit corporation seeking to place six developmentally disabled adults, with house managers living in, in a residential area zoned for duplexes. The almost

identical issue of the definition of a single family was involved. The Court essentially found the mentally retarded facility to be a boarding house and cited numerous law review articles and cases pro and con nationwide. Calling an apple an orange does not make it so. (See analyses of cases cited therein.)

Recently, this Honorable Court dismissed an appeal in the matter entitled Macon Association for Retarded Citizens vs. Macon-Bibb County Planning and Zoning Commission, 314 S.E.2d 218 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984).

The Court in Macon, supra, at p. 221, found the definition of single family as set forth in Macon's zoning ordinance to be rationally related to the comprehensive zoning plan and as such withstood equal protection scrutiny and no discrimination existed in excluding mentally retarded facilities. Mentally retarded seeking "group home" living were lawfully excluded not because they were retarded but because they did not fit the rationally-based definition of single family due purely to the number seeking to

reside in the single-family area. The Court further found that an alleged non-profit corporation operating the facility was not exempt from local zoning ordinances.

Local comprehensive zoning plans have long been held to be a valid exercise of a local government's planning and control of land use, especially where such is part of a reasonably comprehensive plan for the development of a given community. Village of Belle Terre vs. Boraas, supra; Village of Euclid vs. Amber Realty, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

In Civitans Care, Inc., supra, Civitans contended that state policy promoting the deinstitutionalization should pre-empt local ordinances. The Court found that such contention assumed that the group homes were prohibited throughout the city in question, which was not the case. The Court further noted that a state policy per se favoring the establishment of group homes does not necessarily have to

pre-empt reasonable, rationally-based zoning ordinances, which is the position presented by this brief.

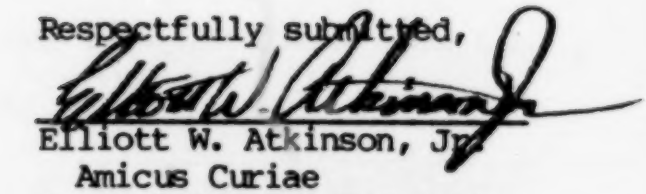
The Court's reasoning in Civitan is directly related to Garcia, supra, in its caution that state programs, salutary as they may be in aid of some of our citizens, must not be allowed to infringe upon the constitutionally protected rights of the average citizen. The equal treatment sought to be protected by the United States Constitution applies to the individual, be he retarded, disabled, homeowner, or ordinary citizen, not to a group banded together. Nothing, nothing should receive greater emphasis and protection by this high Court than the individual and the individual, American, single family. In the present matter, it is the individual single family that needs this Court's protection.

CONCLUSION

It is respectfully submitted that neither mentally-retarded individuals or the mentally

retarded as a group have been discriminated against to require the granting of a suspect classification. Medical and therapeutic treatment has been made available as medical science deemed appropriate and is changing as the knowledge changes and grows. In promoting better and more modern treatment of our mentally ill, de-institutionalization can take place within a state's budgetary capabilities by placing a small number of like developmentally retarded individuals in a small facility located in an appropriately zoned area of a given city. This can be done without taking away others' rights established by rationally-based and related zoning ordinances and specifically-worded, restrictive covenants. Each zoning ordinance and each subdivision restriction would, of course, have to stand on its own merits. This is as it should be. But that right to judge each individual case on its own merits should not be taken away by the overly broad exercise of a state's police power or the finding of a suspect classification where none is merited.

Respectfully submitted,



Elliott W. Atkinson, Jr.
Amicus Curiae
Counsel for The Federation
of Greater Baton Rouge
Civic Associations, Inc.

Maughan, Atkinson & Martin,
Ltd.
1755 Wooddale Boulevard
Baton Rouge, LA 70806
(504) 926-8533

December 28, 1984

CERTIFICATE OF SERVICE

I, Elliott W. Atkinson, Jr., amicus curiae counsel by consent of both parties, and a member of the Bar of the Supreme Court of the United States, admitted March 24, 1980, hereby certify that I have served three copies of the Amicus Curiae Brief in Support of Petitioner on all parties required to be served by depositing three copies of the brief to each party in the United States mail on the 28th day of December, 1984, with first-class postage prepaid, addressed to the following counsel of record for

petitioners: Mr. Earl Luna, 2416 LTV Tower, 1525 Elm Street, Dallas, Texas 75201, and to respondents' counsel, Mr. Renea Hicks and Ms. Diane Shisk, Advocacy, Inc., 7700 Chevy Chase Drive, Austin, Texas 78752.

Elliott W. Atkinson, Jr.
Counsel for amicus Curiae
The Federation of Greater Baton Rouge
Civic Associations, Inc.

Sworn to and subscribed before me this 28th day of December, 1984.

Notary Public, Life Commission

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,

No. 84-468

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS

v.

CLEBURNE LIVING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES FRIED
Special Assistant to the Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

BRUCE N. KUHLIK
Assistant to the Solicitor General

WALTER W. BARNETT
MICHAEL CARVIN
DAVID K. FLYNN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether classifications drawn on the basis of mental retardation are subject to heightened judicial scrutiny under the Equal Protection Clause.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Introduction and summary of argument	5
Argument:	
Classifications on the basis of mental retardation do not violate the Equal Protection Clause so long as they are rationally related to a legitimate state interest	11
A. Heightened scrutiny is not appropriate where members of a class possess special needs and abilities that are relevant to proper governmental choices	11
B. Because mentally retarded persons have distinctive needs and abilities that may properly be taken into account by the legislature, classifications drawn on the basis of retardation are not inherently invidious	17
C. Heightened scrutiny is not supported by other relevant considerations	22
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Board of Education v. *Rowley*, 458 U.S. 176	19, 23
Brown v. *Sibley*, 650 F.2d 760	24
California Ass'n of the Physically Handicapped, Inc. v. *FCC*, 721 F.2d 667, cert. denied, No. 83-2069 (Oct. 1, 1984)	2, 24
City of New Orleans v. *Dukes*, 427 U.S. 297	11
Cospito v. *Heckler*, 742 F.2d 72	1
Craig v. *Boren*, 429 U.S. 190	13, 23
Doe v. *Colautti*, 592 F.2d 704	21, 25

Cases—Continued: Page

Edge v. *Pierce*, 540 F. Supp. 1300 ..... 2, 21
F. S. Royster Guano Co. v. *Virginia*, 253 U.S. 412 .. 11
Fowler v. *United States*, 633 F.2d 1258 ..... 2, 25
Frontiero v. *Richardson*, 411 U.S. 677 .....9, 14, 15, 24
Graham v. *Richardson*, 403 U.S. 365 12
Halderman v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295 24
Korematsu v. *United States*, 323 U.S. 214 12
Lindsey v. *Normet*, 405 U.S. 56 26
Macon Ass'n for Retarded Citizens v. *Macon-Bibb County Planning & Zoning Comm'n*, No. 84-156 (Oct. 1, 1984) 24
Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307 .....9, 14, 16, 24-25
Mathews v. *Lucas*, 427 U.S. 495 15
McLaughlin v. *Florida*, 379 U.S. 184 ..... 11, 16
Mississippi University for Women v. *Hogan*, 458 U.S. 718 ..... 16, 19
Parham v. *Hughes*, 441 U.S. 347 12
Pennhurst State School v. *Halderman*, 451 U.S. 1 .. 19
Pickett v. *Brown*, No. 82-5576 (June 6, 1983) 13
Plyler v. *Doe*, 457 U.S. 202 .....11, 13, 17, 25
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 .....11, 12, 13, 14, 23
Schweiker v. *Wilson*, 450 U.S. 221 1
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 11
Strauder v. *West Virginia*, 100 U.S. 303 12
Tigner v. *Texas*, 310 U.S. 141 17
TVA v. *Hill*, 437 U.S. 153 ..... 7, 12
United States v. *Carolene Products Co.*, 304 U.S. 144 7
United States v. *Lovett*, 328 U.S. 303 7
Upshur v. *Love*, 474 F. Supp. 332 25
Vance v. *Bradley*, 440 U.S. 93 12
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 25
Village of Belle Terre v. *Boraas*, 416 U.S. 1 25
Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 11
Youngberg v. *Romeo*, 457 U.S. 307 .....18, 20, 25

Constitution, statutes and regulation: Page

U.S. Const. Amend. XIV:
Due Process Clause 18, 20
Equal Protection Clause ..... *passim*
Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.* 2
Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* 5, 18, 22
42 U.S.C. 6010(1) 19
42 U.S.C. 6010(2) 19
Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.* 5, 19, 22
20 U.S.C. 1400(c) 23
20 U.S.C. 1412(1) 23
20 U.S.C. 1412(5)(B) 19
Elementary and Secondary Education Act of 1965, 29 U.S.C. 2701 *et seq.* 22
Housing Act of 1959, § 202, 12 U.S.C. 1701q 2, 21
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
§ 7, 29 U.S.C. 706 24
§ 504, 29 U.S.C. 794 ..... 2, 5, 18, 22
42 U.S.C. 1382 19
42 U.S.C. 1391-1394 19
Mentally Retarded Persons Act of 1977, Tex. Stat. Ann. art. 5547-300 (Vernon) 5, 19
20 C.F.R. 416.934 19

Miscellaneous:
Comment, *Can the Mentally Retarded Enjoy "Yards That are Wide?"*, 28 Wayne L. Rev. 1349 (1982) 22
Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) 15, 16
J. Ely, *Democracy and Distrust* (1980) 12, 23, 24
Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) 13
S. Herr, *Rights and Advocacy for Retarded People* (1983) 20
Note, *Quasi-Suspect Classes and Proof of Discrimination*, 90 Yale L.J. 912 (1981) 24

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-468

CITY OF CLEBURNE, TEXAS, ET AL., PETITIONERS

v.

CLEBURNE LIVING CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

A number of federal statutes and programs draw distinctions based on mental impairment and other handicaps. It is in the interest of the United States that rational legislative and administrative judgments in these areas not be invalidated. In *Schweiker* v. *Wilson*, 450 U.S. 221 (1981), for example, in the course of supporting an aspect of the Supplemental Security Income program, we argued that classifications affecting institutionalized mental patients should be scrutinized under the rational-basis test. See also, *e.g.*, *Cospito* v. *Heckler*, 742 F.2d 72 (3d

Cir. 1984) (administration of federal benefits programs); *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 721 F.2d 667 (9th Cir. 1983), cert. denied, No. 83-2069 (Oct. 1, 1984) (application of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) to licensed broadcasters); *Fowler* v. *United States*, 633 F.2d 1258 (8th Cir. 1980) (federal employment classification drawn on the basis of mental retardation); *Edge* v. *Pierce*, 540 F. Supp. 1300 (D.N.J. 1982) (provision of public housing under Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q)). The scope of the Attorney General's enforcement authority under the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997 *et seq.*) will also be affected by the decision in this case.

STATEMENT

1. Cleburne Living Centers, Inc. (CLC) leased a house at 201 Featherston Street in the City of Cleburne, Texas, which it intended to use as a group home for thirteen mentally retarded adults (Pet. App. C5). The City's zoning ordinance requires that a special-use permit be obtained for operation of any " 'hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions' " (*id.* at C6-C7 (emphasis omitted)). Following a public hearing, CLC's application for a special-use permit was denied by the City Council, which considered the following factors in reaching its decision (*id.* at C7):

> 1. the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston;
>
> 2. the location of a junior high school across the street from 201 Featherston;

3. concern for the fears of elderly residents of the neighborhood;

4. the size of the home and the number of people to be housed;

5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;

6. the home's location on a five hundred (500) year flood plain; and

7. in general, the presentation made before the City Council.

2. Following the denial of its application, CLC brought this action in the United States District Court for the Northern District of Texas, alleging that the zoning ordinance, on its face and as applied, contravenes the Equal Protection Clause.[1] The district court rejected this challenge after a bench trial (Pet. App. A1-A22). The court reasoned that "mental retardation is not a suspect or quasi-suspect class promoting strict or heightened judicial scrutiny" and concluded that, under the rational-basis standard, "the ordinance, both as written and applied, passes constitutional muster" (*id.* at A17). The requirement of a special-use permit and its denial here, the court found, were rationally related to the City's legitimate concerns over the location of group housing for retarded adults (*id.* at A17-A18).

3. A panel of the court of appeals reversed (Pet. App. C1-C26). The court held that mentally retarded persons constitute a "quasi-suspect" class for purposes of the Equal Protection Clause, requiring "heightened" or "intermediate" judicial scrutiny of classifications affecting them (*id.* at C16). Although

---

[1] CLC was joined by its vice-president and two advocacy organizations. Statutory and other constitutional claims rejected or not addressed below are not presented in this Court.

it recognized that "mental retardation * * * *is* a relevant distinction in some cases," the court found that a "combination of * * * historical prejudice, political powerlessness, and immutability" with respect to mental retardation requires heightened scrutiny (*ibid.* (emphasis in original)). Applying this standard to the facts before it, the court concluded that the ordinance is unconstitutional both on its face and as applied. The panel assumed that the City's asserted legislative purposes are substantial, but found that the ordinance is not sufficiently tailored to achieving those goals. *Id.* at C19-C25.

Over the dissent of seven of its fifteen sitting judges, the court of appeals denied the City's suggestion for rehearing en banc (Pet. App. D1-D6). Judge Garwood, joined by five other dissenters, criticized the panel's determination that mentally retarded persons constitute a quasi-suspect class. He noted that "[w]here difference in treatment should rationally be expected, it is indeed an ill-advised rule that treats its presence as quasi-suspect" (*id.* at D2), and urged (*ibid.*):

> where fundamental rights are not concerned, a threshold requirement for scrutiny beyond the rational basis level should be that the group singled out for special treatment be not generally, or with respect to the field of regulatory subject matter under consideration, significantly different, as a result of its defining characteristics, from the rest of society in terms of its needs and abilities to function.

Because "[t]he characteristics which define the retarded as a class * * * bear heavily on the individual's needs and abilities to perform or contribute to society over an extremely wide range of functions,

and are highly relevant to proper legislative goals in most respects" (*id.* at D3), Judge Garwood concluded that the proper inquiry under the Equal Protection Clause is whether the challenged classification is rationally based.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Congress and many states, including Texas, have acted with increasing levels of commitment not only to protect the handicapped generally and mentally retarded persons in particular, but also affirmatively to make available significant resources to care for their special needs. See, *e.g.*, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 *et seq.*); Education of the Handicapped Act (20 U.S.C. 1400 *et seq.*); Mentally Retarded Persons Act of 1977 (Tex. Stat. Ann. art. 5547-300 (Vernon)). Against this background of widespread federal and state solicitude for the special needs of mentally retarded persons, the court below erred in the standard it applied to test a determination under a particular local ordinance regarding the appropriate location of one group residence home for retarded adults.

There is no showing here that the state is acting systematically and invidiously to disadvantage mentally retarded persons in respect to their needs—including the need for shelter. More important, mental retardation is a characteristic that appropriately invokes specialized and distinctive governmental responses. Accordingly, decisions about the location of particular facilities for mentally retarded persons should invoke only the residual level of judicial scrutiny appropriate in all cases where a challenge is made to the choice of one group's concerns com-

pared with those of others: did the governmental action bear a rational relation to a legitimate governmental goal.

We are not concerned here with the correctness of the district court's conclusion that such a rational basis exists in this case—indeed we readily concede that, if this case is remanded to the court of appeals for consideration under what we urge is the appropriate constitutional standard, that court may well supportably conclude that the denial of a special-use permit in this case was so wanting in rationality as to fail to pass muster under the Equal Protection Clause of the Fourteenth Amendment.

Our sole concern is with the erroneous and novel determination of the court of appeals that the action of the City of Cleburne under the questioned ordinance should be tested by some more exigent standard of review. The City's actions—actions hardly likely to enlist anyone's sympathies—should not become the occasion for announcing a significant new doctrine, which would intensify the measure of substantive federal judicial oversight of governmental actions by extending it to a category that is not only numerous in itself but that, once admitted, is conceptually difficult to contain.

2. When government embarks on a program of national defense, the claims of education and welfare may suffer. When government undertakes through price supports to maintain the incomes of small family farmers, the interests of consumers and urban workers may suffer. Money spent on remedial education is not available for programs for the gifted. Money spent on arts education is unavailable for science. And the point extends beyond the competition for fiscal resources—the development of our natural resources and the expansion of industry com-

pete with concerns for the environment and wilderness areas. It is the essence of democracy that allocation of limited resources be the subject of public determination in the political arena.[2] See, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153 & n.4 (1938). Every time some aspect of this domain of choice is constitutionalized—however justifiably—a price is paid: there is a corresponding withdrawal from the arena of democratic politics of some portion of the debate about our common political life.

The judiciary's constitutional mandate to discern and restrain legislative actions that have as their overt or covert purpose harm to innocent individuals (*e.g.*, *United States* v. *Lovett*, 328 U.S. 303 (1946)) or groups (*e.g.*, *United States* v. *Carolene Products Co.*, *supra*)—particularly the weak, the disadvantaged and the despised—must be set against this general background of democratic values. In every instance the central task for a reviewing court is to distinguish between such abuses of government power and those legitimate actions that may reasonably be seen simply as instances of the inevitable, sometimes painful choices between competing legitimate ends.

Classifications that disadvantage persons by reason of their race are the paradigm of the invidious, to which the Fourteenth Amendment was directly and

---

[2] Many knowledgeable persons have asserted that community living arrangements are not only less expensive than alternatives but less burdensome to the community in every respect. To the extent that this is so, the basis for justifying the challenged zoning decision here in terms of a rational allocation of benefits and burdens is correspondingly weak. See pages 10, 22, *infra*.

historically addressed, and which still provide the principal focus of judicial concern. Where distinctions are made on the basis of race, the historical record, the strong factual and moral imperative of the unity and equality of all mankind, and the explicit positive directive of the Fourteenth Amendment itself rightly place the heaviest burden of justification on governmental action. Thus strict scrutiny is not simply a talismanic phrase nor an explanation frozen through repetition into a dogma. It is the sensible and natural expression of our nation's skepticism that racially disadvantaging governmental action is ever likely to have a benign purpose, an expression that such action is overwhelmingly likely to be moved by or rooted in impermissibly invidious and derogatory aims.

The contrast to this case is striking. Mentally retarded persons are, undeniably, entitled to individual rights and liberties and to equal treatment before the law. But unlike members of racial minorities, mentally retarded individuals are different from others in respect to their needs and capacities. If, as decency requires, government is to attend to such persons at all, it must attend to and be cognizant of those differences. In the absence of proof that the state is now seeking systematically to disadvantage mentally retarded persons in the totality of its programs and indeed where a combined state and federal regime responsive to the needs of retarded persons is in place, heightened judicial scrutiny of the particular resource allocation decisions among communities and neighborhoods can only invite the judiciary's own recasting of the political balance between one set of worthy claims and another.

Thus, the court of appeals erred in concluding that mentally retarded persons constitute a "quasi-sus-

pect" class for purposes of equal protection analysis. Because there is plainly a relationship between membership in the class and an individual's needs and abilities, legislative classifications drawn on the basis of mental retardation cannot be deemed inherently invidious. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). It would be inconsistent with the purpose of the Equal Protection Clause and the institutional province of the courts to subject such classifications to heightened scrutiny. Where they are rationally related to legitimate governmental purposes, statutes providing differential treatment for mentally retarded persons must be upheld.

3. But are mentally retarded persons not special, in greater need of judicial protection from the vagaries of the political process? Certainly, as we acknowledge at the outset, they are a class that invokes our justified concern and sympathy. But that is a far cry from creating yet another group enabled to compel heightened scrutiny of legislative actions affecting their interests. Petitioners argue that mentally retarded individuals, far from being adversely stereotyped, have been the beneficiaries of extraordinary solicitude in recent years (see Pet. Br. 19-22). The court of appeals' view, on the contrary, is that they have been the victims of historical contempt and negative stereotyping (Pet. App. C3, C13-C14).

Doubtless both contentions are correct. And that is just the point. Many groups have at various times and places been the subject of just such ambivalent social attitudes—victims of cancer, for example, and blind people, the unemployed, and bankrupts. The presence of such ambivalence—all by itself or even coupled with a certain political vulnerability, for the ambivalence may often create just that vul-

nerability—cannot catapault a class of persons into a position where they enjoy the special protection of the judiciary against political actions that appear to (or do) disfavor them relative to some other group. More is needed to justify heightened scrutiny, and that something extra is the *absence* of significantly differentiating needs and capabilities. For these differentiating features are just what necessitate and thus justify distinctive legislative responses to persons in these categories. And once government responds specially to such special needs, it will always be the case that it could have done more.

To be sure, even where this predicate exists for making frequent and pervasive distinctions based on the special needs and characteristics of a group like physically handicapped or mentally retarded persons, such distinctions may in a particular case be the cover for invidious hostility to a disfavored group, rather than a choice among competing legitimate ends. (It is entirely possible, indeed, that this very case represents such an irrational and invidious choice, a discrimination that cannot pass the residual general test of rational relationship.) It is as a brake on this aberrational abuse of government power that courts retain the residual authority to strike down laws that disadvantage some without a rational nexus to a proper governmental goal. This is the kind of scrutiny under the Equal Protection Clause that must of necessity be appropriate to the vast domain of governmental action—of necessity, because otherwise the Equal Protection Clause would drive the judiciary into the role of generally recasting the balance of burdens and advantages that is the stuff of all political decision.

ARGUMENT

CLASSIFICATIONS ON THE BASIS OF MENTAL RETARDATION DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE SO LONG AS THEY ARE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

A. Heightened Scrutiny Is Not Appropriate Where Members Of A Class Possess Special Needs And Abilities That Are Relevant To Proper Governmental Choices

"The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982), quoting *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). In applying this command, the Court has accorded state and local legislation a presumption of validity, generally requiring "only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); see, *e.g.*, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). More "searching judicial scrutiny" is required only where laws "create suspect classifications or impinge upon constitutionally protected rights." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973). Suspect classifications and infringements on fundamental rights will be invalidated unless they are "precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217.

1. The primary objective of the Equal Protection Clause is, of course, to prohibit official racial discrimination. *E.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The Fourteenth Amendment recognizes the history of such discrimination in this

country as well as a moral truth: an individual's race is normally irrelevant to the achievement of any legitimate state interest. See, *e.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). Accordingly, race is the prototypical suspect classification subject to strict scrutiny under the Equal Protection Clause. See generally *Rodriguez*, 411 U.S. at 28; see also *Graham* v. *Richardson*, 403 U.S. 365 (1971) (alienage); *Korematsu* v. *United States*, 323 U.S. 214 (1944) (national origin).

Strict scrutiny is more than a mode of analysis—it embodies a theory of the proper institutional province of the courts. The majoritarian branches of government are vested with the authority and responsibility to allocate resources and in so doing to choose among competing worthy goals. Such is the essence of governing. Application of strict scrutiny to invalidate legislation is appropriate only where there is reason to believe that a court will be able correctly to discern those distinctions drawn by the majoritarian branches of government that are categorically invidious and not susceptible of correction through the democratic process. See *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979 ("[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted") (footnote omitted); *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979) (plurality opinion); J. Ely, *Democracy and Distrust* (1980); cf. *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978). The Court has, accordingly, quite properly been reluctant to extend the category of suspect classes beyond the few instances where not only is the

need for protection from legislative discrimination undeniable but the judiciary's ability to distinguish invidiousness from legitimate policy judgment is also plain. See, *e.g.*, *Plyler*, 457 U.S. at 219 n.19 (illegal aliens not a suspect class); *Rodriguez*, 411 U.S. at 28 (wealth not a suspect class).

2. With respect to certain classifications, the Court has applied an "intermediate" or "heightened" level of scrutiny under the Equal Protection Clause. See *Plyler*, 457 U.S. at 217; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). Under this standard, a classifica- will pass muster only if it is substantially related to important governmental objectives. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Such heightened scrutiny has been applied to classifications based on gender (*ibid.*) and legitimacy (*Pickett v. Brown*, No. 82-5576 (June 6, 1983), slip op. 6-7) and to the complete deprivation of education to undocumented alien children (*Plyler* v. *Doe*, *supra*). The Court has never afforded this level of equal protection scrutiny to mentally retarded persons or to any other group characterized by such a common handicap.

Identification of classes as "quasi-suspect" and so entitled to heightened protection must be informed by the same considerations of institutional competence that have characterized the delineation of the set of suspect classes. The category of quasi-suspect classes is properly quite limited—it cannot, consistent with the Equal Protection Clause, be expanded to give judicial protection to any group that arouses our sympathy and has failed to obtain all that it desires from the legislature. In deciding whether to apply

heightened scrutiny, the Court has regularly considered whether a particular group has suffered from a history of purposeful discrimination. See, *e.g.*, *Rodriguez*, 411 U.S. at 28. But the Court has also insisted—and rightly so—that a further condition be met before heightened scrutiny is justified: a legislative classification will invoke such scrutiny only if the basis for that classification is a characteristic that is irrelevant to the needs or abilities of the individuals being classified.

This Court has consistently pointed to an absence of any relationship between membership in a class and an individual's ability to perform in society as a central criterion for determining whether the class is suspect. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), for example, the plurality observed (*id.* at 686; emphasis added and footnote omitted):

> [W]hat differentiates sex from *such nonsuspect statuses as intelligence or physical disability*, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears *no relation to ability to perform or contribute to society.*

Similarly, in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976), the Court rejected the assertion that age is a suspect classification, reasoning (*id.* at 313; emphasis added):

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been *subjected*

> *to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.*

And in *Mathews* v. *Lucas*, 427 U.S. 495 (1976), the Court applied heightened scrutiny to classifications drawn on the basis of illegitimacy because that characteristic "bears no relation to the individual's ability to participate in and contribute to society" (*id.* at 505). In summary,

> what distinguishes those characteristics [of suspect classifications] from others is the extreme unlikelihood that the legislature can ever justify the departure from * * * equality by showing what *that* particular trait has to do with merit.

Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1173-1174 (1969) (emphasis in original; footnote omitted), cited in *Frontiero*, 411 U.S. at 686 n.18.

Heightened scrutiny is appropriate, then, only where a particular classification is most unlikely to bear a reasonable relation to the distinctive needs or abilities of the members of the class. Such a rule is in keeping both with the historical foundations of the Equal Protection Clause and the institutional role of the courts within a government based on the constitutionally mandated separation of powers. Certain characteristics are irrelevant to the differential allocation of resources inherent in any legislative classification. There is almost never a good reason to distinguish on the basis of those characteristics, such as race, sex and legitimacy—characteristics that say nothing about an individual's needs and abilities. When the legislature imposes burdens on the basis of such irrelevant characteristics, it is fair to presume that its purpose is invidious or is based, not on

true differences, but on stereotypical generalizations reflecting improper normative judgments about the moral worth of certain groups. See generally *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724-725 (1982); *McLaughlin* v. *Florida*, 379 U.S. at 191-193.

But legislative classification premised on factors that distinguish a class in a manner relevant to legitimate governmental interests and choices simply does not constitute the sort of purposeful discrimination that suggests an invidious legislative motive behind the classification. See *Murgia*, 427 U.S. at 312-314 (age not a suspect class). Where a plausible relationship between membership in the class and a proper legislative goal exists, courts will generally be ill-equipped to determine that statutes embodying the classification in question are truly invidious.[3] And without such a determination, a history of legislative classification standing alone cannot establish the sort of discrimination that the Fourteenth Amendment was intended to eradicate. Where a characteristic is relevant to governmental choices responding to differential needs and abilities, the appropriate role for the courts is to ensure that any challenged classification is rationally related to a legitimate governmental purpose. If so, the inquiry is at an end and the legislation must be upheld. See

---

[3] Where, on the other hand, it is "highly implausible" that a correlation between membership in the class and a legitimate purpose exists, "stricter review is required to dispel the natural suspicion—buttressed by reason and experience—that whenever *that* trait is used to single out a group for unfavorable treatment, the state is applying penalties simply for the sake of penalties, with the accompanying suggestion of imputed inferiority." *Developments in the Law, supra*, 82 Harv. L. Rev. at 1175 (emphasis in original; footnote omitted).

generally *Plyler*, 457 U.S. at 216, quoting *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940) (" '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same' ").

B. Because Mentally Retarded Persons Have Distinctive Needs And Abilities That May Properly Be Taken Into Account By The Legislature, Classifications Drawn On The Basis Of Retardation Are Not Inherently Invidious

The court of appeals erred in elevating the class of mentally retarded persons to "quasi-suspect" status for purposes of equal protection analysis. To be sure, mentally retarded individuals have been treated differently in the past and receive statutorily mandated distinctive treatment today. But classification on the basis of retardation does not in itself reflect invidiousness. Rather, the special needs and disabilities of those who are mentally handicapped are plainly relevant to a variety of legitimate legislative goals. Unlike suspect classes, mentally retarded persons *are* different in ways that may appropriately be taken into account by the legislature. They are entitled to enjoy substantive constitutional rights and to be accorded equal treatment. But heightened scrutiny is neither necessary nor consistent with the purpose of the Equal Protection Clause.

1. "[M]ental retardation is a problem of learning * * * manifested particularly in difficulty with abstract thinking, judgment, and problem solving and retention, but also includes [problems related to] social adjustment and economic productivity" (J.A. 37-38). Generally measured by IQ, the condition varies among individuals along a spectrum from mild

and moderate retardation to severe and profound retardation (*id.* at 38). Mild retardation is barely discernible on casual contact and mildly retarded individuals can become self-sufficient and productive members of the community. Many of those who are profoundly retarded, on the other hand, are wholly lacking in self-sufficiency and require life-long care. *Id.* at 39. See generally *Youngberg* v. *Romeo*, 457 U.S. 307 (1982).[4]

Persons who are mentally retarded have special needs and abilities, which quite properly elicit our sympathies. In addressing their distinctive problems, legislatures have of course been required to draw classifications based on mental retardation and its associated characteristics. The legislative response to mental retardation often has been to accommodate the special needs of class members while allowing for the limitations on their abilities.

The federal government has embarked on an ambitious program, embodied in a number of statutes, of protection of and assistance to retarded people. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) provides:

> No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

Similarly, the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 *et seq.*) estab-

---

[4] *Youngberg*, which recognized under the Due Process Clause of the Fourteenth Amendment certain liberty interests in involuntarily committed individuals, was not an equal protection case and, in any event, did not create a constitutional right to community treatment.

lishes a federal-state grant program and declares the congressional intent that persons with developmental disabilities receive "appropriate treatment, services, and habilitation," which "should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. 6010(1) and (2). See generally *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 11-14 (1981). And the Education of the Handicapped Act (20 U.S.C. 1400 *et seq.*) provides that the federal government will assist the states in giving all handicapped children a free appropriate public education, and requires "mainstreaming," *i.e.*, that, "to the maximum extent appropriate, handicapped children * * * [be] educated with children who are not handicapped." 20 U.S.C. 1412(5)(B). See generally *Board of Education* v. *Rowley*, 458 U.S. 176, 179-184 (1982).[5]

2. The distinctive needs and abilities of mentally retarded persons set them apart from classes properly entitled to heightened judicial scrutiny. Unlike statutes drawn on the basis of race or sex or legitimacy, there is nothing inherently "suspect" or "quasi-suspect" about legislative classifications drawn on the basis of mental impairment. The court of appeals erred in concluding otherwise. Quite simply, mentally retarded persons *are* different in respects relevant to legitimate governmental choices—they do "suffer from an inherent handicap" (*Mississippi University for Women* v. *Hogan*, 458 U.S. at 725).

---

[5] Mentally retarded persons also receive assistance under the Social Security Act. See, *e.g.*, 42 U.S.C. 1382, 20 C.F.R. 416.934 (disability benefits); 42 U.S.C. 1391-1394 (federal-state grant program to combat mental retardation). The State of Texas has also made a commitment to protecting and assisting mentally retarded persons. See Mentally Retarded Persons Act of 1977, Tex. Stat. Ann. art. 5547-300 (Vernon).

It would be surprising indeed to find the statute books empty of all mention of retardation. Nor would such a state of affairs be desirable, for those who are retarded or for anyone else. Because of the special needs and abilities of mentally retarded individuals, legislative choices may properly take mental retardation into account. Some persons may rate these choices as not sufficiently solicitous of the needs of retarded individuals. But, where the choices are rational ones and do not violate substantive norms, they are properly for the majoritarian branches of government, not for the federal judiciary. The bulwark of constitutional protection for mentally retarded persons, therefore, lies in the enforcement of their substantive rights under the Due Process Clause. See *Youngberg* v. *Romeo*, *supra*. And rational-basis scrutiny will also provide significant safeguards (see note 2, *supra*). Accordingly, a determination that heightened scrutiny does not apply would simply represent a sound interpretation of the Equal Protection Clause, not an abdication of judicial protection against majoritarian excess.

It may well be, as the court of appeals stated (Pet. App. C13), that not every classification affecting mentally retarded persons has been benign and that "[t]hey have been subjected to a history of unfair and often grotesque mistreatment." See generally S. Herr, *Rights and Advocacy for Retarded People* 9-29 (1983). Undoubtedly, certain forms of such mistreatment would not be countenanced under any level of equal protection scrutiny. But it is not for the courts to assess whether the bulk of legislation has benefitted or harmed retarded people or is otherwise sound public policy. Nor do instances of unfairness require heightened scrutiny where the classifica-

tion is relevant to legitimate governmental objectives.[6] See pages 14-16, *supra*.

Were classifications drawn on mental retardation to be subjected to heightened scrutiny under the Equal Protection Clause, it might well prove difficult to deny on a principled basis such an extra measure of judicial protection to other groups, such as physically handicapped, the infirm, and even those suffering from diseases such as alcoholism.[7] "Intermediate scrutiny" on behalf of "quasi-suspect" classes is in itself something of a departure from the historic foundations of the Fourteenth Amendment (see pages 11-13, *supra*). To expand this category to any group that enlists our sympathies is both insupportable and unwise.

---

[6] Cf. *Doe* v. *Colautti*, 592 F.2d 704, 711 (3d Cir. 1979) ("Although the mentally ill have been the victims of stereotypes, the disabilities imposed on them have often reflected that many of the mentally ill do have reduced ability for personal relations, for economic activity, and for political choice. This is not to say that the legal disabilities have precisely fit the actual incapacities of the mentally ill individuals whom the law has burdened, but it is important that the legal disabilities have been related, even if imperfectly, to real inabilities from which many of the mentally ill suffer.").

[7] The court of appeals' decision, for instance, could place under the judiciary's heightened-scrutiny microscope the decision to make federally subsidized housing with specially adapted facilities available to the aged but not to the physically handicapped, to the physically handicapped but not to mentally retarded persons. See generally Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q); *Edge* v. *Pierce*, 540 F. Supp. 1300 (D.N.J. 1982). In the best of all possible worlds each of these worthy groups would be amply accommodated. But the decision to accommodate some now and others later, some here and others there, cannot be allowed to become as a regular matter grist for the judicial mill.

Whether the City's ordinance, as written and as applied, satisfies the rational basis standard of scrutiny need not be addressed by this Court, but rather should be determined by the court of appeals on remand. We note that the federal government, for its part, is committed to the integration of mentally retarded people into community life. See, *e.g.*, Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; Elementary and Secondary Education Act of 1965, 29 U.S.C. 2701 *et seq.*; Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* But this federal policy commitment does not require judicial scrutiny under the Equal Protection Clause of state and local legislative judgments beyond what is consistent with the nature and purpose of that provision.

C. Heightened Scrutiny Is Not Supported By Other Relevant Considerations

1. The court of appeals also relied on a finding that "mentally retarded persons have lacked political power" in concluding that heightened scrutiny is appropriate (Pet. App. C14). While this may historically be correct, it does not justify heightened scrutiny in the face of the distinctive needs of retarded persons. Moreover, advocacy groups and family members have publicized the special needs of those who are retarded and legislatures and the public have responded. See generally Comment, *Can the Mentally Retarded Enjoy "Yards That are Wide?"*, 28 Wayne L. Rev. 1349 (1982), and sources cited therein. These advances have not merely protected mentally retarded persons from unfair treatment, but have led to the adoption of legislation designed to provide special as-

sistance to handicapped groups, including retarded persons. See pages 18-19, *supra*.

The court of appeals also erred in applying heightened scrutiny to a "large, diverse, and amorphous class." *Rodriguez*, 411 U.S. at 28. Mental retardation is among the most common of human handicaps. Approximately 125,000 persons born each year will be mentally retarded. As many as 6,500,000 individuals now living in the United States may properly be classified as mentally retarded. J.A. 40. Depending on the degree and type of retardation, there are significant differences among retarded persons in terms of their needs and their ability to function in society (*id.* at 39).[8] Accordingly, they are frequently treated differently according to the nature and extent of their disability; the Education of the Handicapped Act, for example, guarantees each handicapped child an "appropriate" education (20 U.S.C. 1400(c), 1412(1)) "tailored to [his] unique needs" (*Rowley*, 458 U.S. at 181).[9]

---

[8] While retarded persons vary in their individual needs and abilities, even the trait of mild retardation will be significant for certain legitimate legislative goals. Hence, classifications with respect to retardation are not suspect on the ground that the characteristic is being used as a proxy for some other trait with which it is not adequately correlated. Compare *Craig* v. *Boren*, 429 U.S. at 199 ("[i]n light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact").

[9] While mental retardation, like suspect and quasi-suspect classes, is "immutable," that factor alone should not be sufficient to call for heightened scrutiny. See J. Ely, *Democracy and Distrust* 155 (1980) (immutability, while not irrelevant,

2. The decision below is contrary to relevant precedent in this Court as well as in the lower federal courts. In *Macon Ass'n for Retarded Citizens* v. *Macon-Bibb County Planning & Zoning Comm'n*, No. 84-156 (Oct. 1, 1984), the Court dismissed for want of a substantial federal question the Supreme Court of Georgia's application of the rational basis test to a zoning ordinance affecting the placement of group homes for mentally retarded persons. See 252 Ga. 484, 314 S.E.2d 218, 221 (1984). The plurality in *Frontiero* v. *Richardson*, *supra*, noted in dictum that classifications based on intelligence are not subject to strict scrutiny (411 U.S. at 686). In *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 721 F.2d 667, 670 (9th Cir. 1983), cert. denied, No. 83-2069 (Oct. 1, 1984), the court of appeals expressly refused to apply strict scrutiny to a classification of handicapped individuals that included mentally retarded persons,[10] and applied rationality scrutiny instead. Similarly, in *Brown* v. *Sibley*, 650 F.2d 760 (5th Cir. 1981), the court held, with respect to a class that included mentally retarded persons, that "the only inquiry is whether [the] alleged classification scheme is 'rationally related to the [state agency's] objective'" (*id.* at 766, quoting *Murgia*,

"cannot be the talisman that some have tried to make it"). Immutability is not in itself associated with the sort of history of discrimination and political powerlessness that would make heightened scrutiny appropriate. See, *e.g.*, *id.* at 150 (no one has explained "*why* we should be suspicious of legislatures that classify on the basis of immutable characteristics") (emphasis in original); see also Note, *Quasi-Suspect Classes and Proof of Discrimination*, 90 Yale L.J. 912, 918 (1981).

[10] The class was defined by the Rehabilitation Act of 1973, 29 U.S.C. 706, which includes those suffering from mental retardation. See *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1323 (E.D. Pa. 1977).

427 U.S. at 315).[11] See also *Fowler* v. *United States*, 633 F.2d 1258, 1262 (8th Cir. 1980) (applying the rationality standard to classification involving mentally retarded persons); cf. *Doe* v. *Colautti*, 592 F.2d 704 (3d Cir. 1979) (mentally ill persons are not entitled to strict scrutiny); *Upshur* v. *Love*, 474 F. Supp. 332, 337 (N.D. Cal. 1979) (applying rational basis test to classification involving blind persons, reasoning that "a physical disability is far different from a characteristic such as race, which does not bear upon one's ability to perform").

3. Finally, the court of appeals erred in suggesting that heightened scrutiny is appropriate because the City's zoning ordinance "withholds a benefit which, though not fundamental, is very important to the mentally retarded" (Pet. App. C17). Retarded persons are entitled to enjoy substantive constitutional rights. See *Youngberg* v. *Romeo*, *supra*. But zoning decisions do not implicate the sort of rights calling for heightened scrutiny under the Equal Protection Clause. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 7-8 (1974); cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (zoning decision violates Equal Protection Clause where motivated by racially discriminatory purpose). The court of appeals' reliance on *Plyler* v. *Doe*, *supra*, is misplaced. In *Plyler*, the Court was confronted with the complete deprivation of education from school-age undocumented aliens, which created a "stigma of illiteracy [that] will mark [the children] for the rest of their lives" (457 U.S. at 223). Here, by contrast, the ordinance may not result in the total deprivation of a benefit, but rather

[11] By applying the rational basis standard, the courts of appeals in these cases implicitly rejected the contention that mental retardation is a quasi-suspect class.

requires that a special-use permit be obtained for the particular location chosen. If this requirement is used to discriminate without relation to legitimate goals, its application will rightly be struck down. But the mere fact that community-based living arrangements in general are important to mentally retarded individuals does not, in the absence of a suspect or quasi-suspect classification, require heightened judicial scrutiny. As the Court noted in *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972), in determining that the need for decent shelter is not a fundamental right giving rise to heightened scrutiny under the Equal Protection Clause, "[w]e do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES FRIED
Special Assistant to the Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

BRUCE N. KUHLIK
Assistant to the Solicitor General

WALTER W. BARNETT
MICHAEL CARVIN
DAVID K. FLYNN
Attorneys

DECEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10136

MOTION FILED
JAN 8 6 1985

No. 84-468

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR DISABLED PEOPLES' INTERNATIONAL AND HUMAN RIGHTS ADVOCATES, INC.

Karen Parker
154 Fifth Avenue
San Francisco, CA, 94118
(415) 668-2752
Attorney for Amici Curiae

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Motion for Leave to File Brief Amici Curiae	vi
Interest of the Amici	1
Summary of the Argument	1
Argument	3
I. MENTALLY RETARDED PERSONS ARE AN IDENTIFIABLE CLASS ENTITLED TO FULL EQUALITY UNDER INTERNATIONAL LAW	4
A. International Law Honors The Principles of Equal Protection And Non-Discrimination	4
B. International Law Protects The Rights Of Mentally Retarded Persons	7
II. THE RATIONAL BASIS STANDARD OF REVIEW DENIES MENTALLY RETARDED PERSONS THEIR RIGHT TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW	16
A. The Rational Basis Test Fails To Account For Special Differences	17
B. Derogation From The Principles Of Equal Protection And Non-Discrimination Is Only Permitted In Extreme Circumstances	20
C. Housing Has A Special Significance In Achieving Full Equality For And Integration Of Mentally Retarded Persons	21
Conclusion	24

TABLE OF AUTHORITIES

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

United Nations Charter 4

Charter of the Organization of American States ("O.A.S.") 4

Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948) 4,5,6,9,10,12,13,16

American Declaration of the Rights and Duties of Man, Ninth International Conference of the American States, O.A.S Res. XXX (1949) 5,16,16

American Convention on Human Rights, in force July 18, 1978, O.A.S. T.S. No. 36 16,20

International Covenant on Civil and Political Rights, in force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR, Supp.(No. 16) at 52, U.N. Doc. A/6316 (1967) 20

European Convention on Human Rights and Fundamental Freedoms, in force Sept. 3, 1953, Europ. T.S. No. 5 20

Geneva Convention IV of 1949, in force Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 ... 8

DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4 23

South West Africa Cases (Second Phase 1966), 1966 I.C.J. 248 8

UNITED NATIONS MATERIALS

The World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, 37 U.N. GAOR, Supp.(No. 51) at 185, U.N. Doc. A/37/51 (1982) 13,22

G.A. Res. 34/154, 34 U.N. GAOR, Supp. No. 46) at 178, U.N. Doc. A/34/46 (1979) 12

G.A. Res. 31/123, 31 U.N. GAOR, Supp. (No.39) at 104, U.N. Doc. A/31/39 (1976) 12,22

Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N. GAOR, Supp.(No. 34) at 88, U.N. Doc. A/10034 (1975) 10,11,12,22

Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N. GAOR, Supp.(No. 29) at 93, U.N. Doc. A/8429 (1971) 8,9,10,19,22

U.N. E.S.C. Commission on Human Rights Res. 1984/31, 40 U.N. ESCOR, Supp. (No.4) at 67, U.N. Doc. E/1984/14 (1984) 14,17

U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1984/24, U.N. Doc. E/CN.4/1985/__ (1985) 14,15

U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1983/15, U.N. Doc. E/CN.4/1984/3 at 82 (1984) 14,17

U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1982/1, U.N. Doc. E/CN.4/1983/4 at 71 (1983) 14,15,17

Written Statement Submitted By Disabled Peoples' International, a non-governmental organization in consultative status, U.N. E.S.C. Commission on Human Rights (Agenda Item 12), U.N. Doc. E/CN.4/1984/NGO/30 (1984) 15

UNITED STATES CASES

Lareau v. Manson, 507 F. Supp 1177 (D. Conn 1980) vii

Plyler v. Doe, 457 U.S. 202 (1982) ... 18

San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973) 18

The Paquete Habana, 175 U.S. 677 (1900) ix

Wyatt v. Stickney, 344 F.Supp. 387, 390, n. 6 (M.D. Ala. 1972), aff'd. sub. nom., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) vii

OTHER AUTHORITIES

1980-1981 Annual Report, O.A.S. Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.59 (1982) 7

Lauterpacht, An International Bill of the Rights of Men (1945) 7

J. Pictet, Fundamental Principles of Humanitarian Law (Geneva 1966) 8

Address by R.J. Dupuy, Member,
Academie de France, Opening
ceremony, Institut International
des Droits de l'Homme, Strasbourg,
France (July 5, 1982) 7,8

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Disabled Peoples' International and Human Rights Advocates, Inc. move for leave to file the attached brief amici curiae. Opposing counsel has not consented.

1. Disabled Peoples' International (hereinafter DPI) is a non-profit organization of physically, sensorily and mentally impaired people founded in 1981 to obtain full participation and equality for disabled persons in all societies. DPI's members, from nearly 100 countries, include disabled national legislators, judges, scholars and leaders of international reknown. DPI was granted consultative status with the United Nations in 1983. Reports issued by DPI are used by the United Nations and other international bodies. DPI actively participates in United Nations human

rights forums and at the Organization of American States. DPI is acutely concerned with discrimination against disabled people and institutional barriers to effective redress.

2. Human Rights Advocates, INC. (hereinafter HRA) is a non-profit corporation established to promote and protect human rights. HRA provides public education about the uses of international human rights law in domestic and international forums. HRA members have worked in the United Nations Human Rights Centre, the Office of the United Nations High Commissioner for Refugees, the Inter-American Commission on Human Rights of the Organization of American States, and the Council of Europe. HRA members regularly represent human rights concerns in international forums and have written numerous scholarly works on international law.

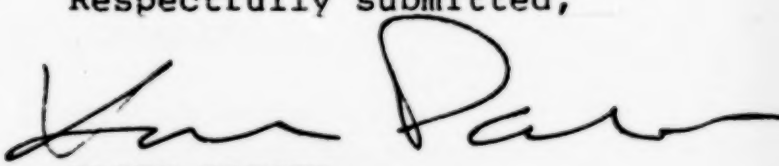
3. Amici would like to present the Court with relevant international standards that should be taken into account in determining Respondents' equal protection claim. A brief on international norms is desirable because of the value of these norms in guiding the Court and because amici are aware that neither party will address them. The international norms applicable in this case deal specifically with the right of mentally retarded persons to effective redress for discriminatory practices. International standards both inform domestic laws and provide independent rights. See, e.g., Wyatt v. Stickney, 344 F. Supp. 387, 390 n.6 (M.D. Ala. 1972), aff'd sub. nom, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (international instrument on rights of mentally retarded provide guidance); Lareau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980)(international standards on

treatment of prisoners inform the Eighth Amendment of the United States Constitution), and The Paquete Habana, 175 U.S. 677 (1900)(customary international law protects coastal fishing vessels from wartime seizure even though permitted under domestic law).

CONCLUSION

The activities and experience of amici give them a unique perspective on and substantial interest in the issues before the Court. For these reasons, amici respectfully request that this motion for leave to file a brief amici curiae be granted.

Respectfully submitted,



KAREN PARKER
154 Fifth Avenue
San Francisco, CA
94118
Tel: (415) 668-2752

Attorney for Amici
Curiae

BRIEF OF DISABLED PEOPLES' INTERNATIONAL AND HUMAN RIGHTS ADVOCATES, INC., AS AMICI CURIAE

INTEREST OF THE AMICI

Amici curiae have set out in the motion for leave to file this brief their endeavors to secure human rights for mentally retarded persons and any other persons who are subjected to practices that contravene international law. Disabled Peoples' International has members who will be directly effected by the outcome of this case. Human Rights Advocates, INC. works to promote and protect international law rights of mentally retarded persons.

SUMMARY

At issue in this appeal is the standard of review to be used to redress discriminatory practices directed at mentally retarded persons.

Amici curiae respectfully request the Court to uphold the result of

the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 5, 1984 and reported at 726 F.2d 191.

Amici curiae will set forth relevant international standards showing that (1) mentally retarded persons, as an identifiable class, are entitled to full and effective redress for discriminatory practices directed against them, and (2) a rational basis standard of review fails to provide mentally retarded persons with that redress.

Amici curiae respectfully urge that the Court, guided by internationally accepted human rights norms, find that mentally retarded persons are entitled to full and effective redress for discriminatory practices.

ARGUMENT

Mentally retarded person have been killed, enslaved, sterilized, ostracized, debased, and dehumanized by all societies throughout recorded history. Every state of the United States and every member state of the United Nations has institutions or other set-apart areas where mentally retarded people are sent to live. Yet it is a tragic irony that mentally retarded people frequently become invisible and unidentifiable as a class when they or their supporters attempt redress for even the most blatant discriminatory practices. In recognition of this intolerable situation, the international community has been compelled to clarify the human rights of mentally retarded persons so that they are understood as minimum acceptable standards of conduct for civilized nations.

I. MENTALLY RETARDED PERSONS ARE AN IDENTIFIABLE CLASS ENTITLED TO FULL EQUALITY UNDER INTERNATIONAL LAW

A. International Law Honors the Principles Of Equal Rights And Non-Discrimination

International law affirms the dignity and worth of the human person. U.N. Charter, 2d preamb. para. To implement this concept, the United Nations promulgated the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948)(hereinafter Universal Declaration). The Universal Declaration provides "a common standard of achievement for all peoples and all nations." Id., proclam. para. In the American regional system, there is recognition that American solidarity requires "a system of individual liberty and social justice based on the essential rights of man." O.A.S. Charter, 3d preamb. para. To implement this concept, the Organization of American States promulgated the American

Declaration of the Rights and Duties of Man, Ninth International Conference of the American States, O.A.S. Res. XXX (1949) (hereinafter American Declaration). The American Declaration proclaims, inter alia, that:

> national constitutions recognize that juridical and political institutions . . . have as their principle aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness.

Id., 1st declar. para. Individuals hold rights not because they are of a certain nationality but because these rights are attributes of the human personality. Id., 2d declar. para.

Both instruments set forth minimum standards relevant and applicable to this case. The Universal Declaration provides, in pertinent part:

> Article 1. All human beings are born free and equal in dignity and in rights. They are endowed with reason and conscience and

> should act towards one another in a spirit of brotherhood.
>
> Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status.
>
> . . .
>
> Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration
>
> . . . .

Universal Declaration, articles 1, 2, and 7 (emphasis added). The American Declaration contains parallel provisions. American Declaration, 1st preamb. para. and article II.

The equal protection and non-discrimination provisions of international human rights law are universally acknowledged as imperative if there will be effective realization of any other protected rights of the human person. As one international expert states:

> The claim of equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting place of all other liberties.

Lauterpacht, An International Bill of the Rights of Men 115 (1945). These norms occupy the first place in international human rights documents.

B. International Law Protects, In Particular, The Rights Of Mentally Retarded Persons

With noteworthy insight, the international community recognizes that the ineluctably linked principles of equal protection and non-discrimination protect the biological tendency towards diversity: international law honors individual differences while requiring aggregate equality. Address by R.J. Dupuy, Member, Academie de France, Opening ceremony, Institut International des Droits de l'Homme, Strasbourg, France (July 5, 1982)(full text in library of Institut).

International law provisions respecting non-discrimination presume equality with differences: "egalite pour tous -- difference pour chacun." Id. See also South West Africa Cases (Second Phase 1966), 1966 I.C.J. 248, 311 (Tanaka, J., dissenting)(humans, though different, equal in dignity as persons).[1]

Persistent exploitative and discriminatory practices directed at mentally retarded persons prompted the United Nations to promulgate the Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N. GAOR, Supp.(No.29) at 93, U.N. Doc. A/8429

---

[1] The right to non-discrimination is also essential in international humanitarian law. E.g. Geneva Convention IV of 1949, in force Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, arts. 3, 13. Differences in treatment relate only to better protection of the rights of protected persons. See J. Pictet, Fundamental Principles of Humanitarian Law 39-45 (Geneva 1966).

(1971)(hereinafter Declaration on Mentally Retarded). This instrument sets forth some specific rules recognizing the differences inherent among people with mental retardation and how these differences should be addressed in conformity with equal protection rights and other rights contained in, inter alia, the Universal Declaration. Declaration on Mentally Retarded, 3d preamb. para. Of particular importance, the United Nations affirms that mentally retarded persons have the same rights as other human beings "to the maximum degree of feasibility." Id., op. para.1. In certain circumstances mentally retarded persons are granted special rights not granted others in order to better protect or exercise their universally recognized interests. For example, mentally retarded persons have the right to "rehabilitation and guidance" (Id., op. para. 2) and the "right to a qualified

guardian when this is required to protect [their] well-being and interests." Id., op.para. 5. Additions, exceptions or limitations to rights are always to be viewed according to whether they tend to promote integration of mentally retarded persons into ordinary community life or whether they tend to perpetuate discriminatory attitudes or isolation. Id., 5th preamb. and op. para. 4. Restrictions that tend to perpetuate discriminatory attitudes or foster isolation clearly contravene the Universal Declaration as it applies to mentally retarded persons.

Because of continuing violations of the rights of mentally retarded persons and other persons with disabilities, the United Nations identified certain rights of all disabled persons, including mentally retarded persons. Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N. GAOR, Supp.(No.34) at 88,

U.N. Doc. A/10034 (1975)(hereinafter Declaration on Disabled Persons). This instrument reaffirms the obligation of states to pursue policies of full integration in normal life. Declaration on Disabled Persons, 1st preamb. para. Particularly relevant to this case, the Declaration on Disabled Persons provides, in pertinent part:

> 3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.
>
> 4. Disabled persons have the same civil and political rights as other human beings.
>
> . . .
>
> 10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

Declaration on Disabled Persons, op. paras. 3,4, and 10.[2]

Deep concern about, inter alia, the gravity of discriminatory practices directed at mentally retarded and other persons with disabilitites and awareness of the need to reaffirm principles of human rights, fundamental freedoms and the dignity of the human person inspired the United Nations to proclaim 1981 International Year of Disabled Persons. G.A. Res. 31/123, 31 U.N. GAOR, Supp.(No. 39) at 104, U.N. Doc. A/31/39 (1976). By subsequent resolution, the United Nations proclaimed the theme of the International Year: "Full participation and equality." G.A. Res. 34/154, 34 U.N. GAOR, Supp.(No. 46) at 178, U.N. Doc. A/34/46 (1979). At the conclusion of the International Year, the United Nations adopted the World Programme of Action Concerning Disabled

---

[2] International human rights law protects all persons from "inhuman, or degrading treatment or punishment." Universal Declaration, art. 5.

BEST AVAILABLE COPY

Persons. G.A.Res. 37/52, 37 U.N. GAOR, Supp.(No. 51), U.N. Doc. A/37/51(1982) (hereinafter World Programme). The World Programme provides, in pertinent part:

> In considering the status of disabled persons with respect to human rights, priority should be placed on the use of the United Nations covenants and other instruments . . . that protect the rights of all persons. This principle is consistent with the theme of the International Year of Disabled Persons.

World Programme, para. 163 (emphasis added).

As mandated by paragraph 169 of the World Programme, the United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter Sub-Commission) passed a resolution reminding the international community that article 2 of the Universal Declaration "applies also to disabled persons." U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protec-

tion of Minorities, Res. 1982/1, U.N. Doc. E/CN.4/1983/4 at 71 (1983). The Commission on Human Rights and the Sub-Commission continue to pay particular attention to the human rights problems of mentally retarded and other persons with disabilities. See U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and the Protection of Minorities, Res. 1983/15, U.N. Doc.E/CN.4/1984/3 at 82 (1984); U.N. E.S.C. Commission on Human Rights Res. 1984/31, 40 U.N. ESCOR, Supp.(No.4) at 67, U.N. Doc. E/1984/14 (1984); U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1984/24, U.N. Doc. E/CN.4/1985/___ (1985). The situation of mentally retarded and other disabled persons is considered so grave that the Commission on Human Rights authorized a Special Rapporteur, appointed by the Sub-

Commission in 1984, to report on, inter alia, "[a]ll forms of discrimination against disabled persons." Sub-Commission Res. 1984/24, supra, op. para.2. See also Written Statement Submitted by Disabled Peoples' International, a non-governmental organization in consultative status, U.N. E.S.C. Commission on Human Rights (Agenda item 12), U.N. Doc. E/CN.4/1984/NGO/30 (1984).

Amici curiae conclude that international norms and action decisively indicate that mentally retarded persons are entitled to full equality before the law and that mentally retarded persons constitute a class of persons universally recognized as vulnerable in their ability to exercise their rights. Mentally retarded persons are a class of persons whose differences mandate special efforts to assure that their rights are protected.

II. THE RATIONAL BASIS STANDARD OF REVIEW DENIES MENTALLY RETARDED PERSONS THEIR RIGHT TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

The rights of mentally retarded persons cannot be safeguarded effectively by a mere rational basis standard of review. The Universal Declaration provides that all persons, including mentally retarded persons, are entitled to an "effective remedy by the competent national tribunals" when their rights, including, preeminently, their right to non-discriminatory practices, are violated. Universal Declaration, article 7. Accord, American Declaration, article XVIII. See also, American Convention on Human Rights, in force July 18, 1978, O.A.S. T.S. No. 36, article 25 (informs meaning of article XVIII of the American Declaration). Barriers to redress, such as class identification analyses that preclude effective suits under equal protection guidelines, led the United

Nations to call for strengthening procedures whereby mentally retarded persons may seek redress for human rights violations such as discrimination in housing. Sub-Commission Res. 1982/1, op. para. 1; Sub-Commission Res. 1983/15, op. para. 5; Commission on Human Rights Res. 1984/31.[3]

A. The Rational Basis Test Fails to Account for Special Differences

Under current rational basis analysis, a law, even if facially discriminatory, is entitled to a presumption of validity and is upheld if some

---

[3] The Organization of American States Inter-American Commission on Human Rights concurs with the United Nations' preoccupation with legal impairments. Disabled persons "form[] a sector whose rights no one defends, and whose needs receive scant attention. . . . In fact they are often excluded from the legal system. . . . " 1980-1981 Annual Report, O.A.S. Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.54 (1982) at 126-127.

relationship can be found to legitimate government purposes. See Plyler v. Doe, 457 U.S. 202, 216 (1982); San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 40, 55 (1973). This standard is particularily inappropriate to review laws affecting mentally retarded persons because of the special differences between mentally retarded persons and non-mentally retarded persons, and among mentally retarded persons themselves, recognized in international law. Intense review of any provision burdening the rights of a class of persons acknowledged to have special differences is logically necessary because it is that classes' rights and interests that must be ascertained and protected in conformity with equal protection and non-discrimination principles. A primary thrust in the directives of international law protections of mentally retarded persons has been to assure serious review

of any action restricting rights of mentally retarded persons. For example, international law provides:

> Whenever mentally retarded persons are unable . . . to exercize all of their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedures used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and the right of appeal to higher authority.

Declaration on Mentally Retarded, op. para. 7.

In this case, mentally retarded persons as a class have been denied the right to equal housing opportunities without any legal safeguards at all, much less those that look to individual abilities. The rational basis test does not look to whether mentally retarded persons are able to exercise their rights:

the focus is on the rationality of the government's acts.

B. Derogation From The Principles Of Equal Protection And Non-Discrimination Is Only Permitted In Extreme Circumstances

The rights of equal protection and non-discrimination are only derogable in extreme circumstances (war, public danger or emergency that threatens the independence or security of the state) in all international and regional human rights treaties, indicative of the common understanding of the international community of the importance of these rights. See, e.g., International Covenant on Civil and Political Rights, in force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR, Supp.(No. 16) at 52, U.N. Doc. A/6316 (1967), article 4; American Convention on Human Rights, in force July 18, 1978, O.A.S. T.S. No. 36, article 27; European Convention on Human Rights and Fundamental Freedoms, in force Sept. 3,

1953, Europ. T.S. No. 5, article 15. An ordinance, like the one in question here, that specifically names a class of persons to be excluded by biological attributes is not entitled to deference and must be presumed to be invalid unless the criteria for derogation are shown. A standard of constitutional review higher than rational basis must prevail where, as here, internationally recognized human rights are at issue.

C. Housing Has A Special Significance In Achieving Full Equality For And Integration Of Mentally Retarded Persons

Discrimination in housing directed at mentally retarded persons has received extraordinary attention by the international community because of the mandate for integration to rectify a particular evil -- the historic isolation of disabled persons in special living arrangements. The international community recognizes the importance of the style of

living and access to housing that disabled persons need to realize equality. Housing styles should be as similar as possible to the housing styles of non-mentally retarded persons. Equal housing opportunities are essential to accomplish full equality and participation. Declaration on Mentally Retarded, op. para. 4; Declaration on Disabled Persons, 6th preamb. para.; G.A. Res. 31/123, 31 U.N. GAOR, Supp.(no. 39) at 104, U.N. Doc. A/31/39 (1976), 3d preamb. para; World Programme, paras. 1, 21, 114. Integration logically requires residential choices equal to residential choices of others, yet tailored to the unique needs of mentally retarded persons. For mentally retarded persons, tailoring may consist of supportive assistance in a group home setting. See, World Programme, paras. 24,25,115. Denial of housing opportunities because of certain special needs of mentally retarded persons contra-

venes the international law directives.

CONCLUSION

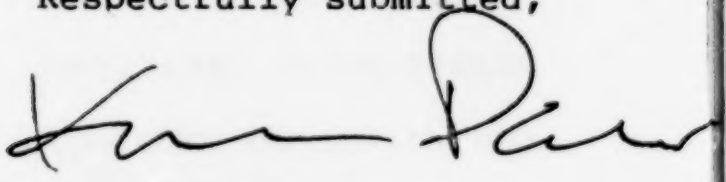
Societies continually undergo adjustments, adapting themselves to new standards of civilized practices. Standards that were acceptable or useful at one stage of development may require a sea change at a later one. The international community has now set forth standards of achievement that reflect the current understanding of civilized practice regarding mentally retarded persons. International law requires that all nations resolutely move forward in a constant effort to match domestic performance with international expectation. See, Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4, 33 (principles and rules of human rights are obligations owed by all states to the international community as a whole). It is up to

BEST AVAILABLE COPY

civilized societies to at least root out discrimination in its crudest forms.

Amici curiae respectfully urge the Court, guided by international human rights norms, to uphold the result of the judgment of the court of appeals.

Respectfully submitted,



KAREN PARKER

154 Fifth Avenue
San Francisco, CA
94118
Tel: (415) 668-2752

Attorney for Amici

BEST AVAILABLE COPY

Office-Supreme Court, U.S.
FILED
JAN 29 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-468

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,

Petitioners

V.

CLEBURNE LIVING CENTER, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF ON BEHALF OF PENNSYLVANIA, IOWA, MICHIGAN, MINNESOTA, NEW HAMPSHIRE, NEW JERSEY, OHIO and WISCONSIN, AMICI CURIAE

LeROY S. ZIMMERMAN
Attorney General

ALLEN C. WARSHAW
Chief Deputy Attorney General
Chief, Litigation Section

ANDREW S. GORDON
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

(Additional Counsel Listed Inside)

Additional Counsel:

Thomas J. Miller
Attorney General of Iowa
Hoover Building
Des Moines, Iowa 50319

Frank J. Kelley
Attorney General of Michigan
Law Building
Lansing, Michigan 48913

Hubert H. Humphrey, III
Attorney General of Minnesota
Second Floor
Ford Building
117 University Avenue
St. Paul, Minnesota 55155

Stephen E. Merrill
Attorney General of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301-6397

Irwin I. Kimmelman
Attorney General of New Jersey
State House Annex
Second Floor
Trenton, New Jersey 08625

Anthony J. Celebrezze, Jr.
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

Bronson C. LaFollette
Attorney General of Wisconsin
State Capitol Building
Madison, Wisconsin 53702

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
INTERESTS OF AMICI	1
ARGUMENT	
I. INTRODUCTION AND SUMMARY OF ARGUMENT	4
II. THE PROPER STANDARD FOR DETERMINING THE CONSTITUTIONAL RIGHTS OF THE MENTALLY RETARDED IS THE RATIONAL RELATIONSHIP TEST	6
III. THE ZONING ORDINANCE AT ISSUE IN THIS CASE DOES NOT SATISFY THE RATIONAL BASIS TEST	14
CONCLUSION	17

TABLE OF CITATIONS

Cases	Page
Commonwealth v. Ogontz Area Neighbors Association, 483 A.2d 448 (Pa. 1984)	2
Craig v. Boen, 429 U.S. 190 (1976)	9
Dandridge v. Williams, 397 U.S. 471 (1970)	15
Frontiero v. Richardson, 411 U.S. 455 (1981)	9
Kirchberg v. Feenstra, 450 U.S. 455 (1981)	9
Logan v. Zimmerman Brusyh Co., 455 U.S. 422 (1982)	14
Mills v. Habluetzel, 456 U.S. 91 (1982)	9
Pennhurst State School and Hospital v. Halderman, ___ U.S. ___ (1984)	1
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)	1
Plyer v. Doe, 457 U.S. 202 (1982)	passim
Reed v. Reed, 404 U.S. 71 (1971)	9
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	7

TABLE OF CITATIONS

	Page
Trimble v. Gordon, 430 U.S. 762 (1977)	9
Weinberger v. Salfi, 422 U.S. 749 (1975)	7,8
Youngberg v. Romeo, 457 U.S. 307 (1982)	passim
Statutes	
Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §6000 et. seq.	12
Education of the Handicapped Act, 20 U.S.C. §1400 et. seq.	12
Section 504, Rehabilitation Act of 1973, 29 U.S.C. 794	12

INTERESTS OF AMICI

Amici States offer a broad array of services to their mentally retarded citizens, including public education, vocational training, and institutional care and habilitative services.[1] In addition, amici have developed large community placement programs for the mentally retarded through which they encourage, finance and monitor the creation and maintenance of homes in the community much like those at issue in this case. In addition, in at least one amicus state, (Pennsylvania) those programs are subject to and have, on occasion, been thwarted by local zoning ordinances.

---

[1]Pennsylvania's institutional services have been the subject of litigation before this Court on several occasions. See Pennhurst State School and Hospital v. Halderman, ___ U.S. ___ (1984); Youngberg v. Romeo, 457 U.S. 307 (1982); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

See Commonwealth v. Ogontz Area Neighbors Association, 483 A.2d 448 (Pa. 1984).

A decision by this Court prescribing the appropriate standard of review for governmental action affecting mentally retarded persons will have a profound impact on Amici's ability to manage their programs properly and efficiently. In this regard, it is important that this Court adopt a constitutional standard for reviewing programs for the retarded which does not unnecessarily restrict the exercise of professional judgment which must guide the day to day decisions of state officials who deal with the needs of the retarded. At the same time, Amici are is also interested in ensuring that the retarded are not discriminated against on the basis of irrational fears grounded in stereotypical views of the retarded.

For the reasons stated below, Amici believe that the rational basis test is the appropriate test to be applied in most cases involving the mentally retarded, including this case. However, we also believe that the zoning ordinance at issue here, which discriminates on the basis of unexplained, and we believe irrational, fears cannot withstand even that deferential level of scrutiny. We, therefore, urge that the judgment of the Court of Appeals be affirmed.

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has already addressed, in another context, the real issue presented by this case: the "proper standard for determining whether a State adequately has protected the rights of the . . . mentally retarded." Youngberg v. Romeo, 457 U.S. 307, 321 (1982). Specifically, in Youngberg, this Court held that the proper standard for determining whether a State adequately has protected the rights of the involuntarily-committed mentally retarded was whether "'professional judgment in fact was exercised'" Id. Significantly, in adopting that relatively relaxed standard of review, the Court explicitly rejected, as too demanding, the compelling" and "substantial" necessity tests applied by the Court of Appeals in that case. 457 U.S. at 322.

In Youngberg, the Court rejected the more demanding tests because it believed that they would "place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents." Id. Thus, at least implicitly, the Court has already decided that the mentally retarded are not a class, "quasi-suspect" or otherwise, whose treatment must always be reviewed under an intermediate standard of review. Similar concerns require rejection of the substantial necessity test adopted by the Court of Appeals in this case. Rather, we believe that the lower level of scrutiny, where the treatment or classification at issue need only bear some fair relation to a legitimate public purpose, is appropriate. See Plyler v. Doe, 457 U.S. 202, 216 (1982).

Nonetheless, the zoning ordinance at issue in this case fails to meet even this deferential test. Thus, we urge this Court to affirm the decision of the Fifth Circuit, albeit on different grounds than those urged by respondents.

II. THE PROPER STANDARD FOR DETERMINING THE CONSTITUTIONAL RIGHTS OF THE MENTALLY RETARDED IS THE RATIONAL RELATIONSHIP TEST

We start our analysis by admitting to substantial doubts concerning the propriety of an intermediate level of scrutiny under any circumstances. In our view, the use of such a test "trespass[es] on the assigned function of the political branches under our structure of limited and separated powers . . . ." Plyler v. Doe, supra, 457 U.S. at 242 (Burger, C.J., dissenting).

Certainly, such a test should be applied, if at all, only with special care. Otherwise it could easily become a "virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." Weinberger v. Salfi, 422 U.S. 749, 772 (1975). This is because, unlike the highest level of scrutiny, which is applicable only in those cases involving either fundamental rights or suspect classifications,[2] the applicability of the intermediate test depends on the "unique confluence" of a number of factors, the significance of which will often be impossible to predict in advance of judicial review. See Plyler

---

[2]See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

v. Doe, supra, 457 U.S. at 243 (Burger, C.J., dissenting).

In any event, this Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), leaves little doubt concerning the test to be applied in most cases involving the mentally retarded. Specifically, in Youngberg, this Court addressed the question of the "proper standard for determining whether a State adequately has protected the rights of the . . . mentally retarded." Id. at 321.[3] In deciding that issue, the Court explicitly rejected a lower court's use of "compelling" and "substantial" necessity tests to

---

[3]Admittedly, Youngberg involved the substantive due process rights of the mentally retarded. However, this Court has generally applied the same standard of review in evaluating substantive due process claims as it has in determining claims under the Equal Protection Clause. See Weinberger v. Salfi, 422 U.S. 749, 771-79 (1975).

determine whether Pennsylvania officials had violated the rights of an involuntarily-committed mentally retarded prison. Id. at 322. Certainly, in so doing, it also rejected, implicitly at least, the notion that the mentally retarded is a group, "quasi-suspect" or otherwise, to which the intermediate standard of review-- that requiring substantial necessity -- must be used in every case.[4]

---

[4]Compare Craig v. Boren, 429 U.S. 190, 197 (1976) (classifications based on gender must be "substantially related" to legitimate purpose); Mills v. Habluetzel, 456 U.S. 91, 97 (1982) (same test applied to legislation involving illegitimate children). See also Kirchberg v. Feenstra, 450 U.S. 455 (1981)(gender); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Frontiero v. Richardson, 411 U.S. 677 (1973)(gender); Reed v. Reed, 404 U.S. 71 (1971) (gender).

The decision in Youngberg also leaves little room for the argument that a higher standard will often be applicable to the mentally retarded because of the importance of the rights affected. See Plyler v. Doe, supra. Certainly, it is hard to imagine rights much more important or basic than those at issue in Youngberg -- the rights to safe institutional conditions and to freedom from restraints. Certainly, no more important rights are at issue in this case.

Moreover, the subclass of mentally retarded involved in Youngberg -- the involuntarily-committed -- are clearly even more helpless, both politically and in fact, than either the group as a whole or the group of mentally retarded persons presented in

this case.[5] Thus, under the Plyler analysis, there is no basis for applying a higher standard of review in this case that that applied in Youngberg.

Finally, the reasoning of Youngberg is equally applicable to most programs involving the mentally retarded. Specifically, most governmental decisions regarding the mentally retarded involve, or at least should involve, professional judgments. With regard to many of those professional judgments there is no one right answer or even one right approach. To impose a

---

[5]The group in this case consists of thirteen retarded persons who are apparently capable of living independently in the community. In contrast, because of the severe character of his retardation, it was conceded that no amount of training would make it possible for Romeo to be released from the State's care. Youngberg v. Romeo, supra, 457 U.S. at 317.

higher level of justification than rationality would "restrict unnecessarily the exercise of professional judgment as to the needs [of the mentally retarded]." See Youngberg v. Romeo, supra, 457 U.S. at 322. Indeed, a higher level of scrutiny might require more than is possible in this quickly evolving field.

It is also relevant, of course, that the mentally retarded are, in fact, different in significant respects. There is no question that they, therefore, have special needs which require differences in treatment.[6]

---

[6]Thus for example, Congress has acted to provide increasing levels of protection and resources for the mentally retarded. See, e.g., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et. seq.; Education of the Handicapped Act, 20 U.S.C. § 1400 et. seq. Indeed, the CONTINUED ON NEXT PAGE.

Thus, we believe that the rational basis test both "affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of [the mentally retarded]." See Youngberg v. Romeo, supra. We, therefore, believe the Court of Appeals erred in applying the higher, substantial necessity test in this case.

FOOTNOTE 6 CONTINUED

abundance of legislation directed at assisting the mentally retarded seriously undermines the lower court's findings that the mentally retarded "lacked political power" and that "political organizations for the mentally retarded . . . still possess relatively little power," findings which were critical to its holding that the retarded are a quasi-suspect class. (Appendix to Petition for a Writ of Certiorari, C-14-15).

III. THE ZONING ORDINANCE AT ISSUE IN THIS CASE DOES NOT SATISFY THE RATIONAL BASIS TEST.

This Court has long recognized that government "must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." Plyler v. Doe, supra, 457 U.S. at 216. The rational basis test reflects this judgment and leaves broad discretion to government in most circumstances.

However, the rational basis test is not a "toothless" one. Logan v. Zimmerman Brush Co., 455 U.S. 422, 438 (1982) (Justice Blackmun's separate opinion). The discretion it grants is not without limits and, in this case, petitioners have exceeded the permiss-

ible scope of that discretion.

Specifically, while government may make rough approximations and need not "choose between attacking every aspect of a problem or not attacking the problem at all," Dandridge v. Williams, 397 U.S. 471, 478 (1970), it must at least attempt rough approximations. In this case, petitioner failed even to make such approximations.

This failure becomes clear from a comparison of those uses permitted under the zoning ordinance and those which are not permitted. For example, public and private schools and colleges, along with their dormitories, fraternity and sorority houses and sports stadiums are permitted. Likewise, homes for delinquent children are permitted in the zone as are hotels, apartment houses and hospitals, all without regard on the number of people living in the

building(s). (Appendix to Petition for a Writ of Certiorari, A-4, District Court Finding of Fact No. 12).

On the other hand, mentally retarded citizens may not establish residence in this zone without a special permit and thirteen mentally retarded citizens were denied such a permit. No credible rational purpose can be established for such unequal treatment of that class. Rather, the true purpose, properly discerned by the Court of Appeals, was to alleviate the irrational fears of other residents of the area. Unsubstantiated and unjustifiable fears do not provide a rational basis for this kind of discrimination. Thus, we believe that the zoning ordinance in this case fails to meet even the deferential rational basis test. We, therefore, urge that this Court affirm the decision of the Court of Appeals.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: _____
ALLEN C. WARSHAW
Chief Deputy Attorney General
Chief, Litigation Section

ANDREW S. GORDON
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Office-Supreme Court, U.S.
FILED
FEB 1 1985
STEVAS,
CLERK

No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STEPHEN H. SACHS,
Attorney General,

DENNIS M. SWEENEY,
Counsel of Record,
Deputy Attorney General,

ELLEN A. CALLEGARY,
Special Assistant to the Attorney General,

JUDITH K. SYKES,
Assistant Attorney General,

REBECCA M. HORNBECK,
Staff Attorney.

February 2, 1985

The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. Introduction 6

II. The Ordinance's Exclusion of Homes for the Mentally Retarded is Not Rationally Related to Any Legitimate Governmental Purpose. 7

III. This Ordinance Violates Equal Protection Because It is Based on Outdated Concepts Which Are No Longer Acceptable. 10

IV. A Finding That the Cleburne Ordinance Fails the Rational Basis Test is Consistent With Prior Decisions of This Court. 13

CONCLUSION 17

TABLE OF CASES

Cleburne Living Center v. City of Cleburne, Texas, 726 F.2d 191 (5th Cir. 1984) ..... 8, passim

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 11

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 12

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 13

Page

Schweiker v. Wilson,
450 U.S. 221 (1981) 7, 8, 14

Stanton v. Stanton,
421 U.S. 7 (1975) 6, 12

United States v. State of Maryland,
C. A. No. M-85-227 (D. Md. 1985) 3

Village of Belle Terre v. Boraas,
416 U.S. 1 (1974) 15, 16

Zobel v. Williams,
457 U.S. 55 (1982) 6, 13

CONSTITUTION

U.S. Const. Amendment XIV, Sec. 1 ..... 5, passim

STATUTES

Md. Ann. Code, Health-General Article,
Section 7-102 2

Section 7-504 4

ORDINANCE

City of Cleburne, Texas Zoning
Ordinance (Pl. Ex. 1) ..... 5, passim

OTHER AUTHORITIES

State of Maryland Department of Health and Mental Hygiene, Mental Retardation and Developmental Disabilities Administration Plan FY 1985-1994, November 1984 2

No. 84-468

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF CLEBURNE, TEXAS, et al.,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

This Court is being asked to decide whether the use of a zoning ordinance to exclude a group home for the mentally retarded is an unconstitutional denial of equal

protection. Because group homes for the mentally retarded are essential to the realization of the State's goals, Maryland has a strong interest in the outcome of this case. It is Maryland's policy to avoid unnecessary admissions of the mentally retarded to institutions, to promote responsible deinstitutionalization of the retarded, and to provide a network of small community living arrangements where the retarded can be integrated into the life of the community. See Md. Ann. Code, Health-General Article, Section 7-102.

In order to meet these goals, Maryland has substantially reduced the number of persons in its institutions for the retarded and has even closed one institution completely. At the same time, the number of community residential placements has grown—from 390 in 1978 to 1675 in 1984. However, almost a threefold increase over the present number of community placements will be needed in the future. The State has projected that by 1994 it will need 4,549 community residential beds.[1]

---

[1] State of Maryland Department of Health and Mental Hygiene, Mental Retardation and Developmental Disabilities Administration Plan FY 1985-1994, November 1984.

The need for additional community placements in Maryland is particularly acute at this time because of the Consent Decree, pursuant to the Civil Rights of Institutionalized Persons Act, entered into by the State of Maryland and the federal government on January 18, 1985.[2] In order to implement the provisions of that agreement, Maryland is substantially reducing the population of Rosewood, its largest facility for the retarded. The realization of this goal is contingent on an increased number of community based programs for the mentally retarded.

In addition to this Consent Decree, Maryland state law also strongly encourages the placement of disabled individuals in the community. While the law does not require the State to create placements if it does not have the resources, they do indicate a strong preference for community placement. Maryland's civil commitment statute requires the exploration of community alternatives prior to

---

[2] United States v. State of Maryland, C. A. No. M-85-227 (D. Md. 1985).

admission to a state institution. Md. Ann. Code, Health-General Article, Section 7-504. If local communities can veto group homes, the right to placement in the least restrictive alternative available will be rendered meaningless.

The projected need for community placements cannot be accomplished if local jurisdictions are in a position to block new group homes for the mentally retarded by the use of exclusionary zoning. It is essential that this Court make it clear that such discriminatory zoning is a violation of equal protection guarantees and will not be tolerated.

SUMMARY OF ARGUMENT

The zoning ordinance[3] at issue in this case is unconstitutional because its discriminatory treatment of the mentally retarded is not reasonably related to any legitimate zoning purpose and, in fact, is based on unfounded and unacceptable prejudices. A finding that this ordinance violates the Equal Protection Clause under rational basis scrutiny would be consistent with this Court's prior decisions. Because there is no conceivable rational basis for Cleburne's exclusionary zoning practice, it is unnecessary for this Court to decide whether mentally retarded persons are a quasi-suspect class for purposes of the Equal Protection Clause.

---

[3] City of Cleburne, Texas Zoning Ordinance (Pl. Ex. 1).

ARGUMENT

I. Introduction

This Court has been asked to review the Fifth Circuit Court of Appeals' finding that a Cleburne zoning ordinance is unconstitutional under an intermediate scrutiny Equal Protection analysis. Cleburne has challenged this finding on the basis that the mentally retarded are not a quasi-suspect class. However, this Court need not reach the question of whether the mentally retarded are a quasi-suspect class. See Zobel v. Williams, 457 U.S. 55, 60-61 (1982); see also Stanton v. Stanton, 421 U.S. 7, 13 (1975). Cleburne's ordinance was written in the "dark ages" of our understanding about the proper treatment of retarded persons and today cannot withstand the light of the most minimal rational basis scrutiny.

Amicus State of Maryland urges this Court to affirm the invalidation of the Cleburne zoning ordinance on Equal Protection grounds using a rational basis analysis. In the alternative, this Court should remand to the court below so it may hold the ordinance invalid after receiving guidance as to the appropriate analysis. Whatever course is taken in

this regard, it is vitally important that this Court clearly deliver the important message that there is sufficient "bite" even under the rational basis test to invalidate zoning ordinances which discriminate against the mentally retarded.

II. The Ordinance's Exclusion of Homes for the Mentally Retarded is Not Rationally Related to any Legitimate Governmental Purpose.

In order to be held valid under the Equal Protection Clause, legislation must, at the very least, classify the persons it affects in a manner rationally related to legitimate governmental objectives. E.g., Schweiker v. Wilson, 450 U.S. 221, 230 (1981). The zoning ordinance states as its objective the usual general language as to promotion of health, safety, and welfare of the community. While this is a legitimate purpose, it is not furthered by the exclusion of group homes for the mentally retarded from its least restrictive residential district.

The City itself implicitly recognized this flaw in its argument and so has attempted to justify this exclusion by going beyond these general purposes. Thus, it argued that

the following purposes not even found in the ordinance were among the statute's objectives: "to protect the serenity of the existing neighborhoods," "to protect neighbors from harm," and "to protect the mental retardates themselves by providing an appropriate living environment." Cleburne Living Center v. City of Cleburne, Texas, 726 F.2d 191, 200 (5th Cir. 1984).

These post hoc rationalizations by the city should be regarded with skepticism by this Court. "When no indication of legislative purpose appears other than the current position of the [person implementing the statute], the Court should require that the classification bear a fair and substantial relation to the asserted purposes." Schweiker v. Wilson, supra, 450 U.S. at 244-245 (Powell, J., dissenting) (citation omitted).

As the record in the court below demonstrates, the Cleburne ordinance does not have that requisite fair and substantial relationship. It does not even meet the ordinary rational relationship requirement. The Court below found that "[n]othing in the record indicates that mentally retarded persons - and particularly those admitted into group homes -

are more disruptive or dangerous than other people ... The discrimination between the mentally retarded and other persons is not explained by recourse to neighborhood serenity." Cleburne, supra, 726 F.2d at 201.

The City's argument that the requirement of a special use permit was justifiable "to protect the mental retardates themselves" is also unpersuasive. First, as the court below found, the ordinance could have served their interests more directly by setting specific requirements for group homes for the retarded. Id. at 201. The absence of such specific requirements merely creates a potential for blanket discrimination, fueled by the fears and prejudices of the neighbors. Ibid. Second, the Department of Human Resources, not the City Council, would be the appropriate authority for determining whether a particular residence met the needs of the retarded. See id. at 193; J.A. 77.

In sum, analysis of the classification at issue in this case leads to the inevitable conclusion that this discriminatory classification is unrelated to any legitimate zoning purpose.

III. This Ordinance Violates Equal Protection Because It is Based on Outdated Concepts Which Are No Longer Acceptable.

The Cleburne city ordinance should fail not only because there is no evidence that it furthers any legitimate governmental purpose, but also because it is based on outdated concepts which are no longer acceptable. In fact, Cleburne's zoning ordinance was enacted 20 years ago at a time when mentally retarded people were locked away in large, isolated institutions. See Cleburne, supra, 726 F.2d at 197 (citation omitted). In 1965, there was no strong national movement to remove the stereotypes about the mentally retarded and to integrate them into the community. As Respondent's expert testified, the image of the mentally retarded which has emerged relatively recently is that they are genuine human beings with the same needs and rights as the rest of humanity with perhaps more obstacles to overcome. J.A. 41. In 1965, it was considered acceptable to separate the retarded from the community. This zoning ordinance's exclusion of "hospitals" for the "feeble-minded" reflects the mistaken preconceptions of that time.

These irrational fears cannot form an acceptable basis for the City's discriminatory classification of the retarded. Equal protection of the law requires a rational basis for Cleburne's classifications. This ordinance fails to provide equal protection to the mentally retarded not only because it has no rational basis, but because it is clearly based on an irrational fear of the mentally retarded. This Court faced an analogous outdated prejudice in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). Justice Powell, in his concurrence, found a regulation requiring a pregnant teacher to take maternity leave five months before the birth of her child to be violative of equal protection using a rational basis analysis. Id. at 653. Justice Powell stated that:

> "[t]he records before us abound with proof that a principal purpose behind the adoption of the regulations was to keep visibly pregnant teachers out of the sight of schoolchildren. The boards do not advance this today as a legitimate objective, yet its initial primacy casts a shadow over these cases. Moreover, most of the after-the-fact rationalizations proposed by these boards are unsupported in the records."

Ibid. (footnote omitted). This Court should find that the

neighbors in this case have no legitimate interest in keeping the retarded out of their sight any more than the Cleveland Board of Education could be said to have a legitimate interest in keeping pregnant women out of the sight of children.

This Court also noted that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection clause do change." Harper v. Virginia State Board of Elections, 383 U.S. 663, 669 (1966). This principle was reiterated in Stanton v. Stanton, 421 U.S. 7 (1975), in which this Court found that no matter which standard was applied, a statute based on "old notions" no longer considered acceptable as to women's place in society would be found to be invalid.

Even the City's after-the-fact rationalizations reflect unfounded and unacceptable concepts that mentally retarded people are disruptive, dangerous and make undesirable neighbors. Thus, this Court should find that Cleburne's zoning ordinance denies mentally retarded people the equal protection of our laws because it is based on irrational and outdated notions of their place in our communities.

IV. A Finding That The Cleburne Ordinance Fails The Rational Basis Test Is Consistent With Prior Decisions of This Court.

While this Court has traditionally shown great respect and deference for the decisions of lawmakers, the rational basis test is not a "toothless" one. E.g., Logan v. Zimmerman Brush Company, 455 U.S. 422, 439 (1982) (Blackmun, J., separate opinion). This Court has not hesitated to reject implausible arguments and find statutes invalid when, as in this case, the arguments made do not withstand analysis. See Zobel v. Williams, 457 U.S. 55 (1982). In Zobel, this Court rejected all of the reasons advanced by the legislature for its scheme to allocate dividends from its mineral income fund among its residents. This Court concluded that no valid state interests were rationally served by a distinction based on the length of a person's residence. The City has similarly shown no valid interests which are rationally served by the distinction it makes between homes for the mentally retarded and facilities for which no permits are required.

Recent cases in which this Court has upheld government action using the rational basis test are clearly distinguishable. In Schweiker v. Wilson, supra, this Court analyzed a statute which granted to persons in various types of public institutions a Supplemental Security Income allowance provided that the institution was receiving Medicaid benefits for their care. Because this Court found no evidence of an intention on the part of Congress to classify on the basis of mental illness, it upheld the challenged statute. This case is different because the City of Cleburne clearly intends to discriminate against the mentally retarded by distinguishing between "hospitals" for the "feeble-minded" and hospitals for others. This Court's decision in Schweiker is also distinguishable because in that case an even more deferential standard was applied than is applied in the usual case. This Court pointed out that it "has granted a 'strong presumption of constitutionality' to legislation concerning monetary benefits because it believes that Congress should have discretion in deciding how to expend necessarily limited resources." Id. at 238 (citation omitted). The ordinance in this case affects no such monetary benefits, but affects the

right of the retarded to live where they wish.

A challenged zoning ordinance did survive rational basis scrutiny in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). The Belle Terre statute affected residences for students and was based on the conclusion that fraternity houses present urban problems such as crowding and noise which are inconsistent with the legitimate goals of having a single family zone where "yards are wide, people few, and motor vehicles restricted." Id. at 9. The Cleburne ordinance is clearly distinguishable because it affects group homes for the retarded in a residential district which allows not only fraternity houses but apartment houses, boarding houses, hospitals, and nursing homes. Unlike the fraternity house in Belle Terre, there is no basis for concluding that the presence of a residence for the retarded would affect legitimate interests of the neighbors. As the court below found, retarded persons do not disturb neighborhood peace and do not drive cars any more frequently or receive visitors more often. Cleburne, supra, 726 F.2d at 200-201.

The City suggests that its zoning ordinance is valid based on the balancing of interests between prospective

residents and the surrounding neighbors (Petitioner's Brief at p. 24). Such a balance has a far different result in this case from the result in Belle Terre. The interest of the retarded in not being excluded from a community is far greater than was the interest of the students. The interest of mentally retarded persons is tantamount to an interest in liberty, for without group homes in the community the only alternative for most is institutionalization. See Cleburne, supra, 726 F.2d at 193.

CONCLUSION

For the foregoing reasons, Amicus State of Maryland urges this Court to affirm the decision of the court below on the ground that the challenged ordinance does not rationally promote any legitimate zoning objective.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General

DENNIS M. SWEENEY, Counsel of
Record, Deputy Attorney General

ELLEN A. CALLEGARY,
Special Assistant
to the Attorney General

JUDITH K. SYKES,
Assistant Attorney General

REBECCA M. HORNBECK,
Staff Attorney

MOTION FILED
FEB - 1 1985

(14)

No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, AND THE COUNCIL FOR EXCEPTIONAL CHILDREN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES W. ELLIS
Counsel of Record
RUTH A. LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:

H. RUTHERFORD TURNBULL, III
STANLEY S. HERR
DONALD N. BERSOFF

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-468

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, AND THE COUNCIL FOR EXCEPTIONAL CHILDREN FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, the American Association on Mental Deficiency, et al., respectfully move the Court for leave to file a Brief *Amici*

Curiae in the above-entitled case. Counsel for Petitioner has not responded to movants' letter requesting consent, but has informally notified counsel for Respondent that he will not consent to the filing of any *Amicus* briefs in support of Respondents. Counsel for Respondents have granted their consent to the filing of this brief.

Amici are the principal professional organizations for professionals providing habilitation, education, and other services to persons with mental retardation. *Amici* thus have substantial knowledge and experience regarding the history of discrimination against retarded people and the extent to which that discrimination continues to the present day. Each of these issues is relevant to the determination of the appropriate level of judicial scrutiny for statutes that discriminate against mentally retarded people.

The American Association on Mental Deficiency (AAMD) is the Nation's oldest and largest interdisciplinary organization of professionals that works exclusively in the field of mental retardation. Founded in 1876 as "The Association of Medical Officers of American Institutions of Idiotic and Feeble-minded Children," it changed its name in 1906 to "The American Association for the Study of the Feeble-minded," and in 1933 to its current name. For decades, AAMD had among its declared objectives "[t]he segregation of mentally deficient persons for institutional care and training with a permanent segregation of those who cannot make satisfactory social adjustments in the community," and this objective was not removed from the Association's statement of purpose until 1954. Among its current objectives are the development of appropriate community-based services for people who are mentally retarded. AAMD today has nearly 10,000 members from a wide variety of disciplines who work with retarded people in both institutional and community settings.

The Association for Persons with Severe Handicaps (TASH) (formerly the American Association for the Education of the Severely/Profoundly Handicapped) was founded in 1974 to develop, advocate, and implement the provision of educational and habilitative services for severely and profoundly handicapped individuals guaranteed to them through the Education of All Handicapped Children Act, 20 U.S.C. § 1401, et seq., and related federal laws. TASH now has more than five thousand members, who include parents, educators, therapists, doctors, and other professionals. TASH members work on a daily basis in schools and community programs to reverse historic patterns of segregation and exclusion and to see to it that severely disabled people are included in national life. One of TASH's stated objectives is the "rapid termination of living environments and educational/vocational/recreation services that segregate, regiment and isolate persons from the individualized attention and sustained normalized community interactions necessary for maximal growth, development and the enjoyment of life."

The American Psychological Association (APA) is a voluntary nonprofit, scientific, and professional organization with more than 60,000 members. It has been the major association of psychologists in the United States since 1892. The APA's purpose, as reflected in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare." This case is of special interest to the over 1,000 members of APA's Division on Mental Retardation, as well as the thousands of other APA members who are engaged in scholarly research and the habilitation, education, and training of mentally retarded persons.

The American Psychiatric Association was founded in 1844 and is the Nation's largest organization of qualified doctors of medicine specializing in psychiatry. Over 30,000 of the Nation's approximately 37,000 psychiatrists are members.

The American Orthopsychiatric Association is an interdisciplinary organization of 10,000 members, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of mental disabilities.

The American Association of University Affiliated Programs for the Developmentally Disabled is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation. These programs employ professionals who represent all disciplines in the field of mental retardation and, among other activities, provide or assist in the provision of community-based educational, residential and vocational services to people who are mentally retarded.

The Council for Exceptional Children is a national organization in the field of special education whose 50,000 members include teachers of people who are mentally retarded, providers of other community-based services for people who are mentally retarded (such as occupational, physical, and vocational therapy and habilitation), and academicians, trainers and researchers in the field of mental retardation.

Amici believe that the nature of the invidious discrimination against people who are mentally retarded is such that heightened judicial scrutiny is needed, and thus *Amici* believe that the decision of the Fifth Circuit should be affirmed. *Amici* take a position different from that of Respondents in urging that the "rational basis test" of minimal judicial scrutiny should not be employed in this case.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying *Amici* brief in the present case in support of the Respondent.

Respectfully submitted,

JAMES W. ELLIS
RUTH A. LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
Counsel for
American Association on
Mental Deficiency, et al.

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. PERSONS WITH MENTAL RETARDATION CONSTITUTE A DISCRETE AND INSULAR MINORITY ENTITLED TO HEIGHTENED SCRUTINY	3
A. Mentally Retarded Persons Comprise a Discrete and Insular Minority	3
B. There Is a Substantial History of Legislation That Invidiously Discriminates Against Retarded People	7
C. Mentally Retarded People Are Still Subjected to Invidious Discrimination	15
D. The Invidious Discrimination Results, In Part, from the Disenfranchisement and Political Powerlessness of Retarded People	18
II. THE FACT THAT MENTAL RETARDATION IS RELEVANT TO SOME LEGITIMATE STATE LEGISLATION DOES NOT PRECLUDE FINDING RETARDED PEOPLE A SEMI-SUSPECT CLASS	19
III. LAWS THAT DISCRIMINATE AGAINST PEOPLE WITH MENTAL RETARDATION SHOULD BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY	23
A. The Rational Basis Test Is an Inadequate Tool for Evaluating the Constitutionality of Statutes Which May Invidiously Discriminate on the Basis of Mental Retardation	23

TABLE OF CONTENTS—Continued

Page

B. Intermediate Scrutiny Is a Particularly Appropriate Method for Distinguishing Laws That Unconstitutionally Discriminate Against Mentally Retarded People from Those Laws That Employ the Classification in a Non-invidious Fashion 25

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 4a

TABLE OF AUTHORITIES

CASES: Page

Ambach v. Norwick, 441 U.S. 68 (1979) 8
Board of Education of Cleveland Heights v. State, 47 Ohio App. 417, 191 N.E. 914 (1934) 24
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) 11, 24, 29
Buck v. Bell, 274 U.S. 200 (1927) 10, 24
Caban v. Mohammed, 441 U.S. 380 (1979) 27
Califano v. Webster, 430 U.S. 313 (1977) 27
Cleburne Living Center, Inc. v. City of Cleburne, Texas, 735 F.2d 832 (5th Cir. 1984) 5
Craig v. Boren, 429 U.S. 190 (1976) 25, 27
Foley v. Connelie, 435 U.S. 291 (1978) 18
Frontiero v. Richardson, 411 U.S. 677 (1973) 7, 21
Fullilove v. Klutznik, 448 U.S. 448 (1980) 20
Goesaert v. Cleary, 335 U.S. 464 (1948) 12
Heckler v. Mathews, 465 U.S. ——, 104 S. Ct. 1387, 79 L.Ed.2d 645 (1984) 25
In re Griffiths, 413 U.S. 717 (1973) 15, 25, 27
Landon v. Plasencia, 459 U.S. 21 (1982) 14
Lau v. Lau, 81 N.H. 44, 122 A. 345 (1923) 10
Mathews v. Lucas, 427 U.S. 495 (1976) 7, 26
Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) 20, 27
Mills v. Board of Educ. of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) 12
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 11
Muller v. Oregon, 208 U.S. 412 (1908) 24
North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 20
Orr v. Orr, 440 U.S. 190 (1979) 27
Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972) 12
Pennhurst State School & Hosp. v. Halderman (I), 451 U.S. 1 (1981) 17
Pennhurst State School & Hosp. v. Halderman (II), —— U.S. ——, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984) 17

TABLE OF AUTHORITIES—Continued

	Page
Pickett v. Brown, —— U.S. ——, 103 S. Ct. 2199, 76 L.Ed.2d 372 (1983)	25
Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. ——, 103 S. Ct. 2517, 76 L.Ed.2d 733 (1983)	27
Plessy v. Ferguson, 163 U.S. 537 (1896)	11, 29
Plyler v. Doe, 457 U.S. 202 (1982)	7, 19, 25
Procunier v. Martinez, 416 U.S. 396 (1974)	27
Roberts v. United States Jaycees, 468 U.S. ——, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984)	27
Rostker v. Goldberg, 453 U.S. 57 (1981)	20, 27
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	7
Schweiker v. Wilson, 450 U.S. 221 (1981)	24
Skinner v. Oklahoma, 316 U.S. 535 (1942)	10
State ex rel. Beattie v. Board of Education, 169 Wis. 231, 172 N.W. 153 (1919)	13
State v. Wyman, 118 Conn. 501, 173 A. 155 (1934)	10
Storer v. Brown, 415 U.S. 724 (1974)	27
Sugarman v. Dougall, 413 U.S. 634 (1973)	18
Toll v. Moreno, 458 U.S. 1 (1982)	18, 20
United States v. Carolene Products, 304 U.S. 144 (1938)	7
United States v. O'Brien, 391 U.S. 367 (1968)	27
U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973)	24
Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980)	27
Williamson v. Lee Optical, 348 U.S. 483 (1955)	23
Youngberg v. Romeo, 457 U.S. 307 (1982)	17, 28
Zobel v. Williams, 457 U.S. 55 (1982)	21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I	27
U.S. Const. amend. XIV	30
Iowa Const. art. 2, § 5	18
N.M. Const. art. XII, § 5	13

TABLE OF AUTHORITIES—Continued

STATUTES: Page

Education for All Handicapped Children Act, 20 U.S.C. § 1400 et seq. (1982) 13, 22
Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et seq. (1982) 22
Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) 22
Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (1882) 14
Alaska Stat. § 14.30.045(4) (1982) 13
Act of Mar. 15, 1909, ch. § 1, 1909 N.D. Sess. Laws 317, 317-18, amended by Act of Feb. 23, 1967, ch. 214, § 19, 1967 N.D. Sess. Laws 429, 438..... 12
Act of Mar. 28, 1904, ch. 134, § 1, 1094 N.J. Laws 267, 267-68, repealed by Act of Mar. 5, 1918, ch. 281, § 1, 1918 N.J. Laws 1050, 1059..... 12

LEGISLATIVE MATERIALS:

S. Rep. No. 352, 64th Cong., 1st Sess. 1917, to accompany H.R. 10384, *cited in United States ex rel. Patton v. Tod*, 297 F. 385 (2d Cir. 1924), *cert. dismissed per stip.*, 267 U.S. 607 (1925).... 14

OTHER AUTHORITIES

Books:

American Association on Mental Deficiency, *Classification in Mental Retardation* (H. Grossman ed. 1983) 3, 4
The Association for Persons with Severe Handicaps, *Guidelines for Reporting and Writing About People with Disabilities* (1984) 5
M. Barr, *Mental Defectives: Their History, Treatment and Training* (1913) 8
R. Bogdan & S. Taylor, *Inside Out: Two First-Person Accounts of What It Means to Be Labeled "Mentally Retarded"* (1982) 17
H. Carey, *A Plea for the Sterilization of Certain Defectives, Particularly the Feeble-Minded and Epileptic* (1912) 11

TABLE OF AUTHORITIES—Continued

	Page
A. Cooke, *Alistair Cooke's America* (1976)	14
S. Davies, *Social Control of the Mentally Deficient* (1930)	16
A. Deutsch, *The Mentally Ill in America* (2d ed. 1949)	9
R. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967)	17
H. Goddard, *The Kallikak Family* (1912)	6
W. Goodell, *The American Slave Code* (1853)	12
G. Gunther, *Cases and Materials on Constitutional Law* (10th ed. 1980)	24
L. Kanner, *A History of the Care and Study of the Mentally Retarded* (1964)	9
J. Landman, *Human Sterilization* (1932)	10
Lives in Process: Mildly Retarded Adults in a Large City (R. Edgerton ed. 1984)	17
Pennhurst Longitudinal Study, 1979-1983: Fourth Year Summary (Temple Univ. & Human Services Research Inst. Nov. 1933)	17
T. Regan, *The Case for Animal Rights* (1983)	8
D. & S. Rothman, *The Willowbrook Wars* (1984)	17
S. Sarason & J. Doris, *Educational Handicap, Public Policy, and Social History* (1979)	13
R. Scheerenberger, *A History of Mental Retardation* (1983)	8, 9
A. Stone, *Mental Health and Law: A System in Transition* 119 (1975)	5
L. Terman, *The Intelligence of School Children* (1919)	9
L. Terman, *The Measurement of Intelligence* (1916)	6
H.R. Turnbull & A. Turnbull, *Free Appropriate Public Education: Law and Implementation* (1978)	13
P. Tyor & L. Bell, *Caring for the Retarded in America: A History* (1984)	9
P. Williams & B. Shoultz, *We Can Speak for Ourserves: Self Advocacy for Mentally Handicapped People* (1984)	17

TABLE OF AUTHORITIES—Continued

Page

W. Wolfensberger, *The Origin and Nature of Our Institutional Models* (1975) 8

Articles:

Baer, *The Half-Told Story of Baby Jane Doe*, Columbia Journalism Review 35 (Nov./Dec. 1984) 15

Bersoff, *Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in the Public Schools*, 39 Md. L. Rev. 27 (1979) 9

Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, in 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978) 16

Bogdan & Taylor, *The Judged, Not the Judges: An Insider's View of Mental Retardation*, 31 American Psychologist 47 (1976) 17

Bohy, *Bullets "Welcome" Home for Retarded*, Detroit News, May 6, 1979 16

Bonner, *Halfway House Upsets Cleveland Park*, Washington Post, Sept. 10, 1981 16

Bredemeier & Evans, *Group Home's Neighbors Change Minds*, Washington Post, June 29, 1984.. 17

Chamberlain, *Current Legislation—Eugenics and Limitations of Marriage*, 9 A.B.A.J. 429 (1923) 10

Cook, *Eugenics or Euthenics*, 37 Ill. L. Rev. 287 (1943) 16

Christensen, *"Not My Block" Reactions Greet Group Homes*, Dayton Daily News, Mar. 18, 1984 16

Dunlap, *Antidotes for Superstitions Concerning Human Heredity*, 51 The Scientific Monthly 221 (1940) 16

Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Asthenics 87 (1912) 9, 11

Fernald, *Thirty Years Progress in the Care of the Feebleminded*, 29 J. Psycho-Asthenics 209 (1924) 16

TABLE OF AUTHORITIES—Continued

Page

Finley, *Arson Hits House Planned for Retarded*, Detroit News, Apr. 30, 1982 16

Ford, *Second Home for Retarded Is Set Ablaze*, Detroit Free Press, Dec. 5, 1980 16

Goddard, *The Possibilities of Research as Applied to the Prevention of Feeblemindedness, Proceedings of the National Conference of Charities and Correction* 307 (1915), *cited in* A. Deutsch, *The Mentally Ill in America* 359 (2d ed. 1949) 9

Gould, *Carrie Buck's Daughter*, Natural History 14 (July 1984) 16

Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 Stan. L. Rev. 553 (1979) 19

Information for Authors, 89 Am. J. Ment. Defic. 109 (1984) 5

Johnson, *Discussion on the Care of the Feebleminded and the Epileptic*, in *Proceedings of the National Conference of Charities & Corrections* 410 (1901), *quoted by* Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 43 U. Cinn. L. Rev. 679 (1974) 15

Keating, *The War Against the Mentally Retarded*, New York (Magazine) 87 (Sept. 17, 1979) 16

Klein & Green, *Levels of Political Knowledge of Mildly Retarded Adults*, 84 Am. J. Ment. Defic. 159 (1979) 18

Levine, *Group Homes for Retarded People Still Facing Community Hostility*, Hartford Courant, Dec. 3, 1984 16

Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 Gonzaga L. Rev. 625 (1978) 10

Lusky, *Footnote Redux: A "Carolene Products" Reminiscence*, 82 Colum. L. Rev. 1093 (1982) 6

MacEachron, *Mentally Retarded Offenders: Prevalence and Characteristics*, 84 Am. J. Ment. Defic. 165 (1979) 16

TABLE OF AUTHORITIES—Continued

Page

Murdoch, *The Psychic Treatment of Mental Defectives*, 10 J. Psycho-Asthenics 224 (1906) 15
Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Calif. L. Rev. 917 (1974) .. 16
Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979) 18
Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. Fam. L. 463 (1977) 10
Note, *The Suspect Context: A New Suspect Classification Doctrine for the Mentally Handicapped*, 26 Ariz. L. Rev. 205 (1984) 28
Powell, *Carolene Products Revisited*, 82 Colum. L. Rev. 1087 (1982) 7
Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 Education & Training of the Mentally Retarded 51 (1970) 13
Seltzer, *Correlates of Community Opposition to Community Residence for Mentally Retarded Persons*, 89 Am. J. Ment. Defic. 1 (1984) 16
Shaman, *Persons Who Are Mentally Retarded: Their Right To Marry and Have Children*, 12 Fam. L.Q. 61 (1978) 10
Will, *The Killings Will Not Stop*, The Washington Post, Apr. 22, 1982, at A29 ..... 4, 15
Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Inquirer: The Philadelphia Inquirer Magazine, May 27, 1984, at 18 17
Wolfensberger, *The Extermination of Handicapped People in World War II Germany*, 19 Mental Retardation 1 (1981) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-468

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, AND THE COUNCIL FOR EXCEPTIONAL CHILDREN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations of professionals who provide services to people with mental retardation. For reasons stated in the attached motion, *Amici* have an

interest in eliminating discrimination against retarded people, and thus in heightened judicial scrutiny of discriminatory statutes.

SUMMARY OF ARGUMENT

Claims for heightened judicial scrutiny must be made against the backdrop of the courts' presumption that state laws are constitutional. Departures from that presumption are entertained only when there is sufficient reason to suspect that the laws in question may be invidiously discriminatory. One such departure is the recognition that some "discrete and insular minorities" have been subject to such a history of invidious discriminaton and are so unable to protect their interests because of political powerlessness that heightened judicial solicitude is necessary to protect them from irrational laws based on prejudice. This Court has identified "traditional indicia of suspectness," which, in combination, help identify those groups that need this special judicial protection.

Mentally retarded people share these attributes with the groups that this Court has identified as warranting either strict or intermediate judicial scrutiny. The history of discrimination against retarded people in this country is conceded by *Amicus* United States to be "grotesque." These citizens were deprived of the most fundamental rights because they were erroneously believed to be a "menace" to society and the principal source of immorality, prostitution, and crime. These false stereotypes, and others, survived, in part, because retarded people were deliberately segregated from society. The resulting invidious laws survived, in part, because retarded people were disenfranchised from participating in the political system.

The classification of mental retardation has some legitimate uses in laws aimed at addressing the real needs and disabilities of retarded people. These noninvidious

laws should be upheld by the courts, while debilitating laws based on false stereotypes and prejudice should be found unconstitutional. The "rational basis test" is an inadequate means of identifying laws that invidiously discriminate against retarded people, and this test would give state and lower federal courts insufficient guidance in evaluating future cases of claimed discrimination. The "middle tier" of intermediate scrutiny employed by the Fifth Circuit in this case is a felicitous mechanism for sorting the constitutional from and the unconstitutional in this field. Laws that are not substantially related to an important governmental objective should be invalidated.

ARGUMENT

I. PERSONS WITH MENTAL RETARDATION CONSTITUTE A DISCRETE AND INSULAR MINORITY ENTITLED TO HEIGHTENED SCRUTINY.

A. Mentally Retarded Persons Comprise a Discrete and Insular Minority.

Mentally retarded people are those with a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." [1] The

---

[1] American Association on Mental Deficiency (AAMD), *Classification in Mental Retardation* 1 (H. Grossman ed. 1983). The AAMD definition is generally accepted by professionals, courts and legislatures. The data contained in the rest of this paragraph are also drawn from the AAMD classification manual.

By definition, persons with mental retardation have "impairments in adaptive behavior" that exist concurrently with their subaverage intellectual functioning.

> Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her

etiology of mental retardation is varied, combining environmental, genetic and unknown causes.[2] The degree of disability that affects these individuals also varies, and is generally described by a classification system of

---

age level and cultural group, as determined by clinical assessment and, usually, standardized scales.

Id. at 11.

Adaptive behavior is a term of art, not to be confused with "maladaptive behavior." Maladaptive behavior includes psychiatric and psychological disorders that might be expressed as aggression toward others, aggression toward oneself, malicious destructiveness, and the like. By contrast, impairments in adaptive behavior indicate incompletely developed or inadequate or elementary behaviors that are not as advanced as the person's chronological age would predict. For example, an adult with mild mental retardation may have impairments in adaptive behavior such as an inability to participate effectively in subtle social exchanges, a need for assistance in the purchase of clothing, a need for assistance in travelling to distant towns, an inability to discuss abstract or philosophical concepts, an inability to participate effectively in hobbies requiring complex planning, a need for assistance in handling money, and an inability to handle a demanding job. *Id.* at 207-08. These impairments, together with a low IQ, categorize the individual as mentally retarded. The fact that impairments in adaptive behavior exist does not mean that the person will have maladaptive behavior.

[2] It should be noted that mental retardation is substantially different from mental illness, and that the two conditions are not identical on the key issues of the history of invidious discrimination, immutability, and disenfranchisement. The issue of whether some severely mentally ill people are a quasi-suspect classification is not before the Court in this case.

Mentally retarded people are often described incorrectly as if they "suffered" from a disease.

> Jonathan Will, 10, fourth-grader and Orioles fan (and the best Wiffle-ball hitter in southern Maryland), has Down's syndrome. He does not "suffer from" (as newspapers are wont to say) Down's syndrome. He suffers from nothing, except anxiety about the Orioles' lousy start.

George Will, *The Killing Will Not Stop*, The Washington Post, Apr. 22, 1982, at A29.

four categories: mild, moderate, severe, and profound. Most mentally retarded people are "mildly retarded." (It should be noted that "mildly" retarded people have an intelligence quotient [IQ] between 55 and 70 and thus have a substantial disability; they should not be confused with those who were previously labelled "borderline retarded," who have IQs between 70 and 85 and who are no longer considered by professionals to be mentally retarded.)

Although there is substantial variation among the characteristics and abilities of people with mental retardation,[3] they almost invariably have been treated as a monolithic group by state-supported discrimination.[4]

---

[3] The statute at bar and numerous others use archaic and stigmatizing terms such as "feeble-minded," "fools," "morons," "imbeciles," and "idiots." Dr. Alan Stone, former president of the American Psychiatric Association, has observed that these legal labels are uniquely "odious and . . . invidious." A. Stone, *Mental Health and Law: A System in Transition* 119 (1975). The fact that they remain on the statute books in so many states is indicative of the continuing prejudice retarded people face in legislative bodies.

The terminology in this field is not without difficulty. The Fifth Circuit demonstrated admirable sensitivity in addressing the problems of retarded people, but the term "retardate," which that court employed occasionally, is no longer favored. *The American Journal on Mental Deficiency*'s current statement of "Information for Authors" may provide a useful guide:

> Terminology. The word "retarded" should be used as an adjective rather than as a noun. "Retardate" should be avoided. Because "normal" has multiple meanings, more precise terms, such as "nonretarded" or "intellectually average" are preferred.

89 Am. J. Ment. Defic. 109 (1984). *Accord* The Association for Persons with Severe Handicaps, *Guidelines for Reporting and Writing About People with Disabilities* (1984).

[4] Those instances in which distinctions have been drawn do not support the dissenting opinion (on the issue of rehearing *en banc*) in the Fifth Circuit, 735 F.2d at 834 n.6 (1984), which speculated that mildly retarded individuals may not suffer discrimination. Historically, mildly retarded people were viewed as the greatest

Similarly, the cruel stigma that attaches to being mentally retarded almost never makes distinctions among degrees of retardation. Retarded people of all levels of disability have been isolated from society by exclusion from public schools, denial of fundamental rights, and *de jure* segregation from life in our communities.[5]

This Court has long recognized that certain discrete and insular minorities are entitled to extraordinary judicial solicitude in order to protect them against invidiously discriminatory legislation. Certain attributes of those classes indicate the need for closer scrutiny than is ordinarily employed in cases that do not involve the deprivation of fundamental rights. These attributes include

---

"social menace" and thus were singled out for discriminatory treatment:

> It is safe to predict that in the near future intelligence tests will bring tens of thousands of these high-grade defectives under the surveillance and protection of society. This will ultimately result in curtailing the reproduction of feeblemindedness and in the elimination of an enormous amount of crime, pauperism, and industrial inefficiency. It is hardly necessary to emphasize that the high-grade cases, of the type now so frequently overlooked, are precisely the ones whose guardianship it is most important for the State to assume.

L. Terman, *The Measurement of Intelligence* 6-7 (1916).

> [T]he idiot [severely retarded] is not our greatest problem. He is indeed loathesome; he is somewhat difficult to take care of; nevertheless, he lives his life and is done. He does not continue the race with a line of children like himself. . . . It is the moron [mildly retarded] type that makes for us our greatest problem.

H. Goddard, *The Kallikak Family*, 101-02 (1912).

[5] *See generally* Lusky, *Footnote Redux: A "Carolene Products" Reminiscence*, 82 Colum. L. Rev. 1093, 1105 n.27 (1982): "In my opinion, the phrase 'discrete and insular' applies to groups that are not embraced within the bonds of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power."

immutability,[6] political powerlessness and disenfranchisement, and a history of purposeful unequal treatment or invidious discrimination. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). These criteria do not provide a "neat formula for constitutional adjudication," nor do they require judicial intervention on behalf of "any group that loses a legislative battle." Powell, *Carolene Products Revisited*, 82 Colum. L. Rev. 1087, 1090-92 (1982). Rather, the criteria reflect a recognition that some groups that have suffered a history of unequal treatment and are unable to protect themselves in the political arena may be subjected to invidious and irrational legislation based on stereotypical and prejudicial views. Therefore, these criteria, individually and in the aggregate, must be evaluated carefully to determine whether a particular group is entitled to heightened scrutiny of discriminatory laws.

B. There Is a Substantial History of Legislation That Invidiously Discriminates Against Retarded People.

Mentally retarded people have been subjected to unequal treatment, segregation, and even slavery and death

---

[6] The court below correctly found mental retardation to be an immutable characteristic. J.A. at 127.

This Court's cases have also discussed a factor closely related to immutability: the extent to which the individual is innocent of voluntarily selecting the trait. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). Mentally retarded people certainly fit this description. Similarly, the disability of some retarded individuals may be apparent (visible) to others, and thus increase the likelihood of discriminatory treatment. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). But *Amici* do not contend that innocence (or visibility) alone are sufficient to warrant heightened scrutiny. *See generally Plyler v. Doe*, 457 U.S. 202, 245 (1982) (Burger, J., dissenting). Rather, this Court's cases teach that each of the traditional indicia of suspectness is a tool in the overall task of recognizing those groups that are likely to be the subject of invidiously discriminatory laws and thus deserving of heightened judicial attention.

throughout world history.[7] In this country, the worst period of legal discrimination began in the late nineteenth century and lasted through the 1930s, with perhaps the greatest excesses occurring in the period just after World War I. *Compare Ambach v. Norwick*, 441 U.S. 68, 82 (1979) (Blackmun, J., dissenting). Mentally retarded people were believed, incorrectly, to be the source of most of the criminality and immorality in our society. Numerous laws sought to eliminate their "evil" influence by removing them from society and by curbing what was believed to be their propensity for sexual excess and the transmission of genetic and social defects to future generations. A leading authority of that era declared:

> The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness and its influence as a source of wretchedness to the patient himself and to his family, and as a causative factor in the production of crime, prostitution, pauperism,

---

[7] *See, e.g.*, R. Scheerenberger, *A History of Mental Retardation* 94 (1983); M. Barr, *Mental Defectives: Their History, Treatment and Training* 24 (1913).

Invidious discrimination and prejudice against retarded people have not been limited in the past (nor are they limited today) to eugenic fears. Various other false stereotypical attitudes have also produced discrimination and dehumanizing treatment. These include viewing retarded individuals as subhuman organisms, objects of pity, and "eternal children." *See* W. Wolfensberger, *The Origin and Nature of Our Institutional Models* 5-17 (1975). When these attitudes are reflected in legislation, they can prove tragically disabling to the ability of retarded people to achieve to their individual maximum potential.

Particularly odious are the numerous references in the historical literature that compare retarded people with animals. *Id.* at 37 and sources cited therein. Unfortunately, this invidious comparison is still employed. A respected recent philosophical treatise compares the rights of animals to those of "mentally enfeebled" humans. T. Regan, *The Case for Animal Rights* (University of California Press 1983).

> illegitimacy, intemperance and other complex social diseases. . . . The feeble-minded are a parasitic, predatory class, never capable of self-support or of managing their own affairs. The great majority ultimately become public charges in some form. They cause unutterable sorrow at home and are a menace and danger to the community.[8]

Since procreation by mentally retarded people was (erroneously) thought to be the major source of mentally retarded and other "defective" children, denial of the fundamental right[9] to marry was accomplished by legisla-

---

[8] Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Asthenics 87, 90 (1912). *Accord* Goddard, *The Possibilities of Research as Applied to the Prevention of Feeblemindedness*, Proceedings of the National Conference of Charities and Correction 307 (1915), *cited in* A. Deutsch, *The Mentally Ill in America* 360 (2d ed. 1949) (the retarded person as a "menace to society and civilization[,] . . . responsible in a large degree for many, if not all, of our social problems."); L. Terman, *The Intelligence of School Children* 132-33 (1919) ("The feebleminded . . . are by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feeble-minded is by permanent custodial care.").

For numerous other references as well as modern historical analysis on this point, see P. Tyor & L. Bell, *Caring for the Retarded in America: A History* 71 (1984); R. Scheerenberger, *A History of Mental Retardation* 156 (1983); L. Kanner, *A History of the Care and Study of the Mentally Retarded* 85 (1964). *See generally* Bersoff, *Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in the Public Schools*, 39 Md. L. Rev. 27 (1979). A more detailed survey of the literature on this point may be found in the historiographical note in Appendix A.

[9] The history of invidious discrimination is all the more lamentable because so many of the rights denied to retarded people are those recognized as fundamental: marriage, procreation, voting, and, in a somewhat different sense, freedom from physical confinement. *Amici* do not suggest, of course, that a finding that height-

tion in numerous states. Although such limitations are commonly viewed today as protective of those who may be incompetent to consent to marriage, their original purpose was eugenic.[10] This is evidenced by the fact that some of the statutes, rather than declare such marriages voidable, made them criminal offenses.[11] Eugenic origins can also be seen in the fact that several statutes exempted from the prohibition against marriage mentally retarded wo.nen beyond child-bearing age.

Since barriers to marriage could not prevent all mentally retarded people from conceiving and bearing children, states concluded that more drastic measures were necessary. Perhaps the most familiar of these were the eugenic sterilization laws which were enacted by 29 states between 1907 and 1931. J. Landman, *Human Sterilization* 302-03 (1932). The invidious origin of these laws is reflected in this Court's opinion in *Buck v. Bell*, in which retarded citizens, as a monolithic group, were contrasted to our "best" citizens. The former were char-

---

ened scrutiny is warranted in the instant case will change the result in all cases in which retarded people are deprived of these rights, since judicial scrutiny will already be at the highest level when the right involved is fundamental. *See generally Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[10] Chamberlain, *Current Legislation—Eugenics and Limitations of Marriage*, 9 A.B.A.J. 429 (1923). This eugenic purpose is also made explicit in *Lau v. Lau*, 81 N.H. 44, 122 A. 345 (1923). *See also State v. Wyman*, 118 Conn. 501, 173 A. 155 (1934). For a more detailed discussion, see Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 Gonzaga L. Rev. 625 (1978). *See generally*, Shaman, *Persons Who Are Mentally Retarded: Their Right To Marry and Have Children*, 12 Fam. L.Q. 61 (1978); Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. Fam. L. 463 (1977).

[11] To avoid cluttering the argument with numerous statutory citations and quotations from discriminatory laws, illustrative examples have been cited and described in Appendix B, Statutory References, which is organized by topic.

acterized as "already sap[ping] the strength of the State," threatening to "swamp [society] with incompetence," and certain to produce "degenerate offspring" who were, in turn, doomed to commit capital crimes. 274 U.S. 200, 207 (1927).[12]

It was believed that even eugenic sterilization would be insufficient to protect society, and thus "eugenic segregation" laws were also enacted.[13] Although it is popularly believed today that mental retardation institutions originated from purely charitable impulses, the historical rec-

---

[12] *Amici* respectfully submit that one rough gauge of the intensity of historical invidious discrimination against a particular group can be found in the stereotypical characterization of that group in judicial opinions from earlier eras. *Compare Buck v. Bell with Plessy v. Ferguson*, 163 U.S. 537 (1896), *and Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982).

[13] *See, e.g.*, H. Carey, *A Plea for the Sterilization of Certain Defectives, Particularly the Feeble-Minded and Epileptic* 4-5 (1912):

> What shall we do with the feeble-minded and epileptic already existing? One school says vasectomy, another castration, and still another segregation. None of these is correct in whole but in part only. To reach the proper solution of this question both sterilization, in some form or other, and segregation must be carried out, castration or vasectomy being used as adjuncts to segregation, and going hand in hand with it.

Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Asthenics 87, 93 (1912):

> [High-grade female imbeciles] are certain to become sexual offenders and to spread venereal disease or to give birth to degenerate children. Their numerous progeny usually become public charges as diseased or neglected children, imbeciles, epileptics, juvenile delinquents or later on as adult paupers or criminals. The segregation of this class should be rapidly extended until all not adequately guarded at home are placed under strict sexual quarantine. Hundreds of known cases of this sort are now at large because the institutions are overcrowded.

For a fuller discussion of the segregation of retarded people, see the brief of *Amici* Association for Retarded Citizens, et al.

ord belies this view. Legislative documents, administrative reports, and professional journals of the period all demanded strict segregation in order to prevent the transmission of "incompetence." [14] This can also be seen in the state laws that explicitly differentiated women of child-bearing years from other proposed inmates of state retardation institutions. Other states provided that parents who had placed their minor children in such "state schools" could not obtain their own children's discharge.[15]

Mentally retarded children were also categorically excluded from public schools.[16] Although much of the his-

---

[14] The fact that segregation laws also recited, and in some cases had, additional charitable purposes does not eliminate their basic invidious character. Gender discrimination has often been supported as "protective" of women, *see, e.g., Goesaert v. Cleary*, 335 U.S. 464 (1948), but where it is based on false stereotypes, it is invidious and unconstitutional. Even nineteenth century American slave codes had some minimal provisions to protect slaves from abuse, but it can hardly be contended that this rendered them any less invidious. W. Goodell, *The American Slave Code* 155-96 (1853).

[15] *See, e.g.*: "That any parent, parents, guardian, or custodian who shall make application to have any person admitted to any of the institutions coming under the provisions of this act shall in such application, waive all right to remove such inmate either permanently or for a limited time . . . ." Enacted by Act of Mar. 28, 1904, ch. 134, § 1, 1904 N.J. Laws 267, 267-68, repealed by Act of Mar. 5, 1918, ch. 281, § 1, 1918 N.J. Laws 1050, 1059. "[A]ny inmate of such institution [for the feeble minded] shall not be removed therefrom, except upon a written request of the parent, parents, guardian or custodian of such inmate, which said request must receive the approval of the superintendent before such inmate can be removed." Enacted by Act of Mar. 15, 1909, ch. 213, § 1, 1909 N.D. Sess. Laws 317, 317-18, amended by Act of Feb. 23, 1967, ch. 214, § 19, 1967 N.D. Sess. Laws 429, 438.

[16] *See Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ. of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972). Congress, upon

torical record on this point recites the false stereotype that these children were ineducable, there are also references to the need to protect nonretarded children from them.[17] This is borne out by the fact that as recently as 1962, only 16 states made retarded children, classified by the state as "educable," subject to mandatory attendance laws.[18]

---

enactment of the Education For All Handicapped Children Act, found that

> (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
>
> (4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.

20 U.S.C. § 1400(b) (1982).

Typically, children with handicaps were excluded from the compulsory attendance laws as not having "sufficient physical and mental ability," N.M. Const. art. XII, § 5. *See generally* S. Sarason & J. Doris, *Educational Handicap, Public Policy, and Social History* (1979); H.R. Turnbull & A. Turnbull, *Free Appropriate Public Education: Law and Implementation* 33-84 (1978); Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 Education & Training of the Mentally Retarded 51 (1970).

[17] *See, e.g.*, reference to children as having "a physical or mental condition which . . . will cause the attendance of the child to be inimicable to the welfare of other pupils . . . ." Alaska Stat. § 14.30.045(4) (1982). *See generally State ex rel. Beattie v. Board of Education*, 169 Wis. 231, 172 N.W. 153, 154 (1919) (boy with cerebral palsy excluded from school because he "produces a depressing and nauseating effect upon the teachers and school children").

[18] Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 Education & Training of the Mentally Retarded 51 (1970).

Fear of retarded people can also be seen in Congress' decision to exclude them from immigration to this country.

> The reasons for excluding a physically defective alien are likelihood of his becoming a public charge and inability by his own exertions to care for himself and those dependent upon him, while the real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations, irrespective of the immediate effect thereof on earning capacity. This change was made . . . in line with the well-established public policy of rigidly excluding the mentally deficient.[19]

This ban preceded the national quota system by 40 years.[20] While "our Nation welcomed and drew strength

---

[19] S. Rep. No. 352, 64th Cong., 1st Sess. (1917), to accompany H.R. 10384, *cited in United States ex rel. Patton v. Tod*, 297 F. 385, 395 n.1 (2d Cir. 1924), *cert. dismissed per stip.*, 267 U.S. 607 (1925).

[20] Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (1882). *See also* A. Cooke, *Alistair Cooke's America* 282-84 (1976) (describing Ellis Island):

> They moved in single file through a stockyard maze of passageways and under the eye of a doctor in a blue uniform who had in his hand a piece of chalk. He was a tough instant diagnostician. He would look at the hands, the hair, the faces and rap out a few questions. He might spot a panting old man with purple lips, and he would chalk on his back a capital "H" for suspected heart disease. Any facial blotches, a hint of gross eczema brought forth a chalked "F," for facial rash. Children in arms were made to stand down to see if they rated an "L" for the limp of rickets or some other deficiency disease. There was one chalk mark that every family dreaded, for it guaranteed certain deportation. It was a circle with a cross in the middle, and it indicated "feeble-minded."

Although this discrimination is part of a larger pattern of invidious discrimination, a decision by this Court to apply heightened scrutiny to mental retardation classifications would not affect current immigration laws. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

from the immigration of aliens" generally, *In re Griffiths*, 413 U.S. 717, 719 (1973), this welcome was not and is not extended to families with retarded members.

Finally and most drastically, proposals were made that mentally retarded people should be killed in order to prevent the harm they posed to society.[21] Although these proposals appear not to have been formally codified in American law,[22] the lives of retarded people have not been afforded the same protection as those of their fellow citizens.[23]

C. Mentally Retarded People Are Still Subjected to Invidious Discrimination.

If the history of state-supported discrimination had been ended by changes in laws and public attitudes, *Amici*, as professional associations, would have little reason to urge this Court to employ heightened scrutiny. But prejudice, once loosed, is not easily cabined. Uncontroverted scientific evidence long ago debunked the no-

---

[21] *See, e.g.*, reference to proposed Iowa legislation in 1906 for "removal by the chloroform route," and statement that "the two things are in line[:] . . . . the authority of the law to prevent defectives from being born, and the authority of the law to put them out of the world after they are born." Murdoch, *The Psychic Treatment of Mental Defectives*, 10 J. Psycho-Asthenics 224 (1906). *See also* Johnson, *Discussion on the Care of the Feebleminded and the Epileptic*, in *Proceedings of the National Conference of Charities & Corrections* 410-11 (1901), *quoted by* Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 48 U. Cinn. L. Rev. 679, 697-98 (1974): "I do not think that to prevent the propagation of this class it is necessary to kill them off or to resort to the knife; but, if it is necessary, it should be done."

[22] *Compare* Wolfensberger, *The Extermination of Handicapped People in World War II Germany*, 19 Mental Retardation 1 (1981).

[23] Will, *supra* note 2. Mass media accounts of the current debate regarding newborn babies thought to be mentally retarded often have reflected the view that lives of retarded people have diminished value. *See generally* Baer, *The Half-Told Story of Baby Jane Doe*, Columbia Journalism Review 35 (Nov./Dec. 1984).

tions that mentally retarded people have extraordinary criminal tendencies or pose a eugenic threat of "swamping" society,[24] and there have been strenuous efforts, described by Dr. Roos at trial, to change public attitudes. Nevertheless, public animosity toward retarded people—and especially retarded adults—remains strong.[25] Ac-

---

[24] *See, e.g.*, Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, in 10 Mental Retardation and Developmental Disabilities 172, 176 (J. Wortis ed. 1978); MacEachron, *Mentally Retarded Offenders: Prevalence and Characteristics*, 84 Am. J. Ment. Defic. 165, 175 (1979); Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Calif. L. Rev. 917, 924-28 (1974); Gould, *Carrie Buck's Daughter*, Natural History 14 (July 1984). Voices of caution were heard from the professional community as early as the 1930s, but were not heeded by lawmakers. S. Davies, *Social Control of the Mentally Deficient* 63 (1930); Cook, *Eugenics or Euthenics*, 37 Ill. L. Rev. 287 (1943); Dunlap, *Antidotes for Superstitions Concerning Human Heredity*, 51 The Scientific Monthly 221 (1940): "The Kallikak phantasy has been laughed out of psychology, along with the even more appalling legend of the Nams and the Jukes; but the theories involved in them still linger in popular superstitions . . . ." (For a discussion of the Kallikaks and Jukes, see Appendix A.) Fernald was among the first to have doubts about his earlier alarmist views. Fernald, *Thirty Years Progress in the Care of the Feebleminded*, 29 J. Psycho-Asthenics 209 (1924).

[25] *See, e.g.*, Keating, *The War Against the Mentally Retarded*, New York (Magazine) 87 (Sept. 17, 1979) (describing firebombings, beatings, vandalism and other forms of intimidation in response to proposed group homes for retarded citizens); Levine, *Group Homes for Retarded People Still Facing Community Hostility*, Hartford Courant, Dec. 3, 1984; Finley, *Arson Hits House Planned for Retarded*, Detroit News, Apr. 30, 1982; Ford, *Second Home for Retarded Is Set Ablaze*, Detroit Free Press, Dec. 5, 1980; Bohy, *Bullets "Welcome" Home for Retarded*, Detroit News, May 6, 1979; Christensen, *"Not My Block" Reactions Greet Group Homes*, Dayton Daily News, Mar. 18, 1984; Bonner, *Halfway House Upsets Cleveland Park*, Washington Post, Sept. 10, 1981. *See generally* Seltzer, *Correlates of Community Opposition to Community Residences for Mentally Retarded Persons*, 89 Am. J. Ment. Defic. 1

counts now appearing in the literature by mentally retarded people themselves are particularly persuasive on this issue.[26] The shameful conditions[27] in many retardation institutions bespeak public indifference, at best, to the plight of retarded citizens. This Court was recently put in the remarkable position of having to admonish states that conditions impermissible in the punishment of felons could not be inflicted upon innocent residents of retardation institutions. *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).

(1984). *See also* D. & S. Rothman, *The Willowbrook Wars* 180-99 (1984) (detailing the parallel to opposition to racial integration and also discussing the role of local politicians).

It is noteworthy that adverse reaction to group homes for mentally retarded people often is reduced after the home is in operation for a period of time. *See* Bredemeier & Evans, *Group Home's Neighbors Change Minds*, Washington Post, June 29, 1984. *Pennhurst Longitudinal Study, 1979-1983: Fourth Year Summary* 13-14 (Temple Univ. & Human Services Research Inst. Nov. 1983).

[26] The classic work in this field is R. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967), which found, for example, that former residents of retardation institutions would do almost anything to avoid discovery of the reasons for their institutionalization, including false claims that they had been locked up for crimes. *Id.* at 148-49. Recent works have confirmed Edgerton's observations. *See* Bogdan & Taylor, *The Judged, Not the Judges: An Insider's View of Mental Retardation*, 31 American Psychologist 47 (1976); R. Bogdan & S. Taylor, *Inside Out: Two First-Person Accounts of What It Means to Be Labeled "Mentally Retarded"* (1982); *Lives in Process: Mildly Retarded Adults in a Large City* (R. Edgerton ed. 1984); P. Williams & B. Shoultz, *We Can Speak for Ourselves: Self Advocacy for Mentally Handicapped People* (1984).

[27] *Pennhurst State School & Hosp. v. Halderman (I)*, 451 U.S. 1, 7 (1981); *Pennhurst State School & Hosp. v. Halderman (II)*, —— U.S. ——, 104 S. Ct. 900, 922-23, 79 L.Ed.2d 67, 96 (1984) (Stevens, J., dissenting). For a discussion of the fate of one retarded individual whose mother had the temerity to bring institutional conditions to the attention of this Court, see Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Inquirer: The Philadelphia Inquirer Magazine, May 27, 1984, at 18.

Perhaps the most persuasive and constitutionally relevant proof that prejudicial discrimination has not been eradicated is the fact that many of the invidious laws described in the previous subsection remain in effect. See Appendix B.

D. The Invidious Discrimination Results, In Part, from the Disenfranchisement and Political Powerlessness of Retarded People.

Citizens with mental retardation have been categorically and systematically denied the right to vote.[28] This disenfranchisement has rendered them a politically powerless group, unable to participate effectively in the political arena and thus protect itself from invidious legislation. Categorical disenfranchisement arbitrarily bars some retarded people from voting who have the mental capacity to exercise the franchise,[29] and thus may be impermissible. But even where selective disenfranchisement is a legitimate response to the incapacity of some individuals to vote, it remains a factor that supports heightened scrutiny.[30]

It has been suggested that the existence of advocates for retarded people means that they no longer possess this characteristic of a discrete and insular minority.

---

[28] Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979). Most states disqualify people with mental retardation from voting. A typical example is the Iowa Constitution, which states that "[n]o idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector." Iowa Const. art. 2, § 5.

[29] *See generally* Klein & Green, *Levels of Political Knowledge of Mildly Retarded Adults*, 84 Am. J. Ment. Defic. 159 (1979).

[30] This Court has recognized that the disenfranchisement of aliens is constitutionally legitimate, but that it is still relevant to the ability of that group to fend off invidious legislation. *See Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973); *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring).

(Pet. Brief at 21.) Petitioner generously overestimates the political effectiveness of *Amici* professional and voluntary association [31] and ignores the fact that the interests of such advocates may not always be identical to those of retarded people.[32] The state-supported discrimination against retarded people results from their almost total disenfranchisement, and their political powerlessness impedes the remedy of this discrimination.

II. THE FACT THAT MENTAL RETARDATION IS RELEVANT TO SOME LEGITIMATE STATE LEGISLATION DOES NOT PRECLUDE FINDING RETARDED PEOPLE A SEMI-SUSPECT CLASS.

In addition to identifying the traditional indicia of suspectness, this Court has also observed that suspect classifications "tend to be irrelevant to any proper legislative goal." *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982). The brief of *Amicus* United States attempts to reify this observation into the touchstone of suspectness and, by extension, semi-suspectness. Neither the decisions of this Court nor a careful analysis of the proper role of heightened scrutiny will support this attribution of all-encompassing importance to the presumptive irrelevance of a classification.

Presumptive irrelevance is essentially a shorthand description of some of the traditional indicia of suspectness; it suggests an inquiry into the likelihood that laws aimed at a particular group are the product of invidious discrimination. Classifications that are predominantly employed in a noninvidious manner will frequently re-

---

[31] *See* Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 Stan. L. Rev. 553, 553-54 (1979).

[32] Petitioner's contention would also mean that the Court should reconsider its rule of heightened scrutiny in race and sex discrimination cases because blacks and women are currently active in the political arena and because federal and state governments have enacted civil rights laws.

veal no sustained history of state-supported discrimination.

No classification that this Court has considered is irrelevant to all legitimate state purposes. Racial classifications used for the purpose of remedying past invidious discrimination or implementing constitutional remedies have been found acceptable. *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971). Similarly, gender has been held relevant to important governmental interests. *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). "[E]very classification is relevant to some purposes and irrelevant to others." *Toll v. Moreno*, 458 U.S. 1, 42 n.13 (1982) (Rehnquist, J., dissenting). If dispositive weight is to be placed on the presumptive irrelevance of a classification, this truism can lead to the conclusion that all classifications are suspect, or that none are.[33] *Amici* believe that a better approach is to recognize that the indicia do not provide a mechanical test for suspectness and that the existence of some legitimate uses of a particular classification is only one factor to be weighed in determining an appropriate level of judicial review of discriminatory statutes.

---

[33] Just as presumptive irrelevance is not the ultimate issue in denying suspect or semi-suspect classification, so too it is insufficient, standing alone, to justify one. The mere fact of presumptive irrelevance of a trait, in the absence of the traditional indicia of suspectness, will not support heightened scrutiny. Left-handed persons are a minority in our population, and hypothetical laws which might use this trait as a classifying mechanism will seldom be related to rational governmental objectives. But while left-handedness is a largely immutable characteristic, there has not been a history of serious and invidious discrimination against left-handed people, nor are they incapable of fending for themselves in the political arena. Proposals for laws which might treat them unfairly can therefore be entrusted to the legislatures, and should the political system somehow enact them, the rational basis test of minimal judicial scrutiny will suffice to deal with truly irrational uses of the classification.

As this case demonstrates, mental retardation is often unrelated to any legitimate governmental purpose. But it cannot be said that mental retardation is never an appropriate tool of classification in constitutionally acceptable legislation. A plurality of this Court noted as much in *dictum* in *Frontiero v. Richardson*:[34] "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." The history of systematic discrimination against retarded persons by the laws of this country, such as school exclusion and eugenic segregation, has made it impossible for many of them to "perform or contribute to society" at the level that their actual ability and personal inclination would otherwise allow. But even for individuals whose natural disability is so severe that it greatly limits their ability to "perform" or "contribute," the protection afforded by the Constitution should not be rationed on the basis of performance, either actual or potential. Performance and contribution to society are the acts of individuals rather than of groups, *see generally Zobel v. Williams*, 457 U.S. 55, 72 n.1 (1982) (O'Connor, J., concurring), and individuals will vary within each group in society. The selection of a level of judicial scrutiny, by contrast, rests upon the like-

---

[34] 411 U.S. 677, 686 (1973). This is the purest of *obiter dicta*, since *Frontiero* was a gender case in which the history of invidious discrimination against mentally retarded people was not (and had never been) before this Court. Perhaps more important, that case preceded the development of a middle tier of intermediate scrutiny for those classes that warranted greater protection than the rational basis test but less than strict scrutiny. The *dictum* in *Frontiero* is best read as stating that gender is seldom related to legitimate governmental objectives because its use often betrays stereotypical views of women and thus impedes their full participation in society.

lihood that individuals will suffer discrimination because of prejudice toward the group to which they belong.

Although mental retardation may be relevant more frequently than gender to legitimate governmental objectives, those laws that employ it invidiously bar retarded citizens from the participation which their individual abilities allow. Eugenic segregation laws and accompanying zoning restrictions like the case at bar are examples.

The disabilities which accompany mental retardation are real, and governments must be allowed to take them into account when this is necessary to further an important governmental objective. For example, the Education for All Handicapped Children Act, 20 U.S.C. § 1400 et seq. (1982); the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et seq. (1982); and Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), all treat mentally retarded people differently from mentally typical people. Each of these federal laws, and their counterparts at the state and local levels, represents a legitimate use of the classification.

Thus, in identifying the constitutionally appropriate level of judicial scrutiny, the Court should recognize that there are legitimate and beneficial uses of the classification of mental retardation and, at the same time, should not lose sight of the likelihood of invidiousness that is suggested by the traditional indicia of suspectness. *Amici* believe that the Fifth Circuit properly struck the balance by selecting the intermediate level of scrutiny that follows from finding retarded people a semi-suspect class. Mental retardation is a legitimate legislative classification where degrees of intelligence and accompanying impairment in adaptive behavior are closely related to an important governmental objective. But the classification is impermissible and invidious where the law contemplates a false and stereotyped view of retarded people (whether as a "menace" or as "eternal children").

III. LAWS THAT DISCRIMINATE AGAINST PEOPLE WITH MENTAL RETARDATION SHOULD BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY.

A. The Rational Basis Test Is an Inadequate Tool for Evaluating the Constitutionality of Statutes Which May Invidiously Discriminate on the Basis of Mental Retardation.

The rational basis test is the most deferential level of scrutiny and is used by this Court to evaluate the constitutionality of legislation when there is no reason to depart from the presumption of constitutionality. This level of scrutiny will typically sustain any proffered (or even hypothesized) rationale that might plausibly justify the statute in question, and will require only the most minimal demonstration of "fit" between the purported rationale and the discriminatory law. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Deferential scrutiny is inappropriate for cases involving discrimination against persons with mental retardation because of the history of invidious discrimination and the political powerlessness of the group. As discussed above, these factors have produced laws that greatly disadvantage retarded people based on little more than unfounded stereotypes and unmitigated prejudice. Although some of these laws may be among the very few which can be found unconstitutional even under the rational basis test, many others would survive despite their invidious origin, their illegitimate "actual" purpose, and their harmful impact upon the quintessentially vulnerable individuals who comprise this powerless class.

This is particularly true because even the most harmful of laws that discriminate against retarded people can often be rationalized as having, at least in part, a benign or noninvidious purpose. For example, the original segregation laws often recited as one of their purposes the

care and protection of retarded persons.[35] Total exclusion of retarded children from public schools was typically rationalized on the basis of the state's incorrect presumption that such children could not benefit from education.[36] This situation is similar to that faced by this Court in the area of the discrimination against women, where grossly discriminatory and disabling laws were rationalized as "protective" of the assumed "delicacy" of women. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring); *Muller v. Oregon*, 208 U.S. 412 (1908). This Court responded by abandoning the use of minimal scrutiny when it became clear that many of these laws were invidious in operation and were based on falsely stereotypical and prejudicial attitudes toward the abilities and proper role of women in our society.

It is true that on rare occasions, this Court has employed the rational basis test in a manner that truly scrutinizes the purpose and effect of the legislation in question. *See, e.g., U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). *Amici* believe that this Court should not employ this approach in the instant case. Such a ruling would give insufficient guidance to state and lower federal courts as to the level of scrutiny to be employed in future cases involving classifications based on mental retardation. *See generally Schweiker v. Wilson*, 450 U.S. 221, 243 n.4 (1981) (Powell, J., dissenting). When this Court has used the rational basis test "with bite," *see* G. Gunther, *Cases and Materials on Constitutional Law* 691 (10th ed. 1980), there has been no indication of when such increased scrutiny is man-

---

[35] Similarly, eugenic sterilization laws could be rationalized as being in the best interest of the retarded individual. *See Buck v. Bell*, 274 U.S. 200, 205-06 (1927). But these laws would not be analyzed today at the level of minimal scrutiny because they involve the fundamental right of procreation. *See supra* note 9.

[36] *See, e.g., Board of Education of Cleveland Heights v. State*, 47 Ohio App. 417, 191 N.E. 914 (1934).

dated.[37] This raises the prospect of lower courts continuing to uphold invidious laws under the truly minimal level of scrutiny. (This would result in a correspondingly increased supervisory burden for this Court in determining whether the scrutiny below was sufficiently close.) This Court has the opportunity to avoid these results by employing intermediate scrutiny in this case by finding persons with mental retardation to be a semi-suspect class.

B. Intermediate Scrutiny Is a Particularly Appropriate Method for Distinguishing Laws That Unconstitutionally Discriminate Against Mentally Retarded People from Those Laws That Employ the Classification in a Noninvidious Fashion.

This Court has described the level of scrutiny in "middle tier" cases variously, but generally, laws analyzed at this level "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).[38]

---

[37] Even if the formulation of such guidance was possible, it might be seen as the creation of a fourth tier of scrutiny.

[38] *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982) ("furthering a substantial interest of the state"); *Heckler v. Mathews*, 465 U.S. ——, 104 S. Ct. 1387, 1398, 79 L.Ed.2d 646, 660 (1984) ("exceedingly persuasive justification"); *Pickett v. Brown*, —— U.S. ——, 103 S. Ct. 2199, 2209, 76 L.Ed.2d 372, 380 (1983) ("substantially related to a legitimate state interest"). In discussing strict scrutiny, the Court has made clear that "no particular signficance [attaches] to these variations in diction," *In re Griffiths*, 413 U.S. 717, 722 n.9 (1973), but it is not clear whether this is also true of intermediate scrutiny.

If the different "middle-tier" formulations are not identical in operation, the *Craig* test seems particularly well suited to cases involving mental retardation. Requiring "*exceedingly* persuasive justification" (*Heckler*) might lead lower courts to give insufficient deference to legislatures that use retardation as a benign classification in recognition of actual differences between retarded and nonretarded people. On the other hand, requiring only a substantial relationship to a "*legitimate* state interest" (*Pickett*) may be inap-

This test appears well suited to the problems presented by laws that employ the classification of mental retardation because it directs lower courts to strike down laws that lack an important governmental purpose or where the use of the classification is not closely related to such a purpose. But the test also acknowledges that important state objectives will, in some cases, warrant the drawing of legislative distinctions on the basis of mental retardation. Thus, middle tier scrutiny is appropriate for this classification because it will not condone invidious laws merely because a rational purpose can be imagined and some connection to the law hypothesized. Yet at the same time, it will not erect an insurmountable barrier to non-invidious and useful laws that treat retarded people, in appropriate cases, differently from nonretarded people.

Too frequently in the past, fear, ignorance, and prejudice about people who are mentally retarded have led legislative bodies to enact laws that deprive retarded citizens of opportunities which all other citizens enjoy. Too often legislative inertia or the lingering remnants of prejudice prevent the repeal of these laws. And in some cases, the same remnants of prejudice may lead to the passage of new laws which are invidiously discriminatory. A salient characteristic of all these laws is that they will either be unrelated to any important governmental objective, or, if the objective is sufficiently substantial, its connection to differential treatment of people with mental retardation will be tenuous or nonexistent.

---

propriately deferential in retardation cases. Interests such as acquiescing in the objections of a group home's neighbors might be "legitimate" in rational basis cases (e.g., objection to the location of a particular business) but insufficiently "important" to support discrimination against a semi-suspect class of citizens. Also, allowing any "legitimate" interest to suffice would raise the problem of the "opaque" justification of "administrative convenience." *See Mathews v. Lucas*, 427 U.S. 495, 516-17 (1976) (Stevens, J., dissenting).

The case at bar is a good example. The safety and welfare of citizens are important governmental objectives, but there is certainly no close connection to the ban of "feebleminded" individuals from the apartment house district. The objections of neighbors, although they may be legitimate governmental concerns in ordinary zoning cases under the deferential scrutiny of the rational basis test, are insufficient to support exclusion of a suspect or semi-suspect class of people. "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." *In re Griffiths*, 413 U.S. 717, 722 n.8 (1973).

It will not be difficult to identify important governmental objectives underlying noninvidious laws that employ mental retardation as a classification.[39] The appropriate education of retarded children, the habilitation of

---

[39] The Court has identified "compelling" and "important" governmental interests with surprising frequency. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. ——, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984) (eradicating discrimination against women); *Craig v. Boren*, 429 U.S. 190 (1976) (traffic safety); *Orr v. Orr*, 440 U.S. 268 (1979) (compensating women for past discrimination); *Caban v. Mohammed*, 441 U.S. 380 (1979) (encouraging adoptions); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (providing for needy spouses); *Califano v. Webster*, 430 U.S. 313 (1977) (reducing economic disparities caused by past discrimination); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (raising and supporting armies); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (plurality opinion by Rehnquist, J.) (preventing teenage pregnancies); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. ——, 103 S. Ct. 2517, 76 L.Ed.2d 733 (1983) (protecting the lives of viable fetuses); *Storer v. Brown*, 415 U.S. 724 (1974) (stability of the state's political system). It should also be noted that the Court has also found "important or substantial" governmental interests in employing a somewhat different test in speech cases under the first amendment. *See, e.g., Procunier v. Martinez*, 416 U.S. 396 (1974); *United States v. O'Brien*, 391 U.S. 367 (1968).

Thus, concerns that noninvidious laws beneficial to retarded people will fail middle-tier scrutiny because they lack an important governmental purpose are unwarranted.

retarded adults, the protection of the persons and property of vulnerable individuals in our society, and the eradication of discrimination are certainly among the interests which are weighty enough to satisfy the requirements of intermediate scrutiny.

It seems likely that cases involving mental retardation at the middle tier of judicial analysis will more frequently be decided by the closeness of the "fit" between the government's interest and the discrimination against retarded people.[40] Where, as here, the statute is based on stereotypical and false views of retarded people, the classification is unlikely to be found closely related to any legitimate and important purpose. In contrast, where the statute is grounded in an accurate understanding of mental retardation and its consequences, the classification is likely to be closely connected to the beneficial purpose the legislature sought to address. Of course, legislators are not required to be experts in the field of mental retardation. As with other important areas of governmental activity involving technical or specialized knowledge, legislators who are not motivated by prejudice typically will consult with qualified experts in the field. This Court has made clear that in the field of mental disability law, substantial deference should be granted to states when their actions are based on the professional judgments of mental retardation experts. *See Youngberg v. Romeo*, 457 U.S. 307 (1982). Similarly, where a legislative body has relied upon expert opinion in formulating its laws, it is unlikely to have employed prejudice or stereotypes and to have engaged in invidious discrimination.[41]

---

[40] A survey of the cases in other areas invoking intermediate scrutiny indicates that this is a common attribute of the implementation of this test. *See supra* note 35.

[41] It has been suggested that heightened scrutiny be employed only when the discrimination disadvantages persons with mental retardation. Note, *The Suspect Context: A New Suspect Classification Doctrine for the Mentally Handicapped*, 26 Ariz. L. Rev. 205 (1984). This approach is attractive because it focuses judicial attention on cases in which the classification is most likely to be employed in an invidious fashion. But many uses of the classification are at least facially ambiguous as to whether they are intended to assist and benefit mentally retarded persons. Thus, it may prove cumbersome for the courts to ascribe one of two categories of motivation to the state action before selecting a level of judicial scrutiny. It may prove more convenient to subject all challenged statutes involving retardation to the "important governmental interest" test with the understanding that truly beneficial (and other noninvidious) laws will generally be in furtherance of such interests.

Intermediate scrutiny thus is a felicitous and appropriate mechanism for distinguishing those laws that employ mental retardation as an invidious classification from those that use the classification in a constitutionally permissible fashion.

Amici believe that it is not hyperbole to suggest respectfully that this case presents a juncture for mentally retarded people that is analogous to *Plessy* or *Bradwell*. As in those cases, the Court will be indicating the level of protection that other courts in the future must give to a group which has been the object of pervasive historical discrimination. If this Court were to fail to give clear guidance about the unconstitutionality of invidious discrimination against mentally retarded persons, it could greatly imperil the ability of these most vulnerable citizens to be a part of the life of our community. Our conception of national citizenship must be broad enough to include persons with mental retardation.

CONCLUSION

For the reasons set forth above, *Amici* urge this Court to affirm both the decision of the Fifth Circuit that mentally retarded people are a semi-suspect class and the judgment that the ordinance in question is in violation of the equal protection clause of the fourteenth amendment.

Respectfully submitted,

JAMES W. ELLIS
RUTH A. LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:

H. RUTHERFORD TURNBULL, III
STANLEY S. HERR
DONALD N. BERSOFF

APPENDIX A

HISTORIOGRAPHICAL NOTE

Amici offer this brief historiographical note in the hope that it will prove helpful to the Court in its own research.

The earliest general history that may prove useful is Martin Barr, *Mental Defectives: Their History, Treatment and Training* (1913). Barr was a fanatical alarmist by modern standards, having proposed a national segregating "reservation" (modelled after Indian reservations) and the castration and selective killing of retarded people at various points in his prominent career, which included the superintendency of the institution at Elwyn, Pennsylvania, and the presidency of AAMD. More dispassionate views can be obtained from Peter L. Tyor & Leland V. Bell, *Caring for the Retarded in America: A History* (1984); Leo Kanner, *A History of the Care and Study of the Mentally Retarded* (1964); and Richard Scheerenberger, *A History of Mental Retardation* (1983), the latter having also served as an institutional superintendent and president of AAMD. Professor Wolf Wolfensberger's *The Origin and Nature of Our Institutional Models* (1975), which can also be found as a chapter of the U.S. President's Committee on Mental Retardation's *Changing Patterns in Residential Services for the Mentally Retarded* (R. Kugel & A. Shearer eds., rev. ed. 1976), is particularly informative about the evolution of public attitudes toward retarded people and on the history of eugenic segregation, and is extraordinarily well documented.

Briefer historical accounts can be found in Stanley S. Herr, *Rights and Advocacy for Retarded People* 9-36 (1983); and Albert Deutsch, *The Mentally Ill in America* 332-86 (2d ed. 1949).

The history of the eugenics movement is well documented in K. Ludmerer, *Genetics and American Society* (1972); and Daniel Kevles, *Annals of Eugenics*, The New Yorker, Oct. 8, 15, 22, and 29, 1984.

A review of original sources from the alarmist period must begin with the work of the extremely influential Henry H. Goddard, a most prolific writer who also served as president of AAMD. Particularly relevant are his *Feeble-Mindedness: Its Causes and Consequences* (1914); and *The Criminal Imbecile: An Analysis of Three Remarkable Murder Cases* (1915). But his most influential work was certainly *The Kallikak Family* (1912), which purported to be the geneology of a family with retardation and vice on one side and uncorrupted virtue on the other, suggesting the inheritability of criminality and immorality and the need for eugenic sterilization and segregation legislation. Such pointed geneologies were a popular genre during this period; e.g., R. Dugdale's *"The Jukes": A Study in Crime, Pauperism, Disease and Heredity* (5th ed. 1895); and M. Kostir, *The Family of Sam Sixty* (1916) (the pseudonym drawn from his supposed IQ score). Generous reference to these geneologies is often found in state reports urging the creation or expansion of segregating institutions. Stephen Jay Gould has re-examined Goddard's Kallikak data and discovered that they were deliberately altered to support the author's preconceived conclusions. S. Gould, *The Mismeasure of Man* 171 (1981).

Other important works from this era included S. Davies, *Social Control of the Feebleminded* (1923); J. Landman, *Human Sterilization* (1932); Walter Fernald's *The Burden of Feeble-Mindedness*, 17 J. Psycho-Asthenics 87 (1912); and Fernald, *Thirty Years Progress in the Care of the Feebleminded*, 29 J. Psycho-Asthenics 206 (1924). Many key documents from this and other periods can be found in *The History of Mental Retarda-*

tion: Collected Papers (M. Rosen, G. Clark & M. Kivitz eds. 1976) (2 vols.).

The key professional journal for original sources from the eugenic period is the *American Journal on Mental Deficiency* (published earlier as the *Journal of Psycho-Asthenics*), the principal journal of AAMD. A useful guide to some of its most significant articles is William Sloan & Harvey Stevens, *A Century of Concern: A History of the American Association on Mental Deficiency, 1876-1976* (1976).

On the subject of treatment of retarded people in institutions and the community in the modern era, the best source is David and Sheila Rothman, *The Willowbrook Wars* (1984).

APPENDIX B

STATUTORY REFERENCES

This Appendix sets out some illustrative state laws in the areas of segregation,[1] marriage restrictions, and involuntary sterilization. While some of these statutes have recently been repealed, their longevity demonstrates the persistence of prejudicial stereotypes and discrimination.

A recently published collection of charts of modern state laws in these areas may be found in *Disabled Persons and the Law: State Legislative Issues* (B. Sales, et al., eds. 1982). A historical collection may be found in S. Smith, M. Wilkinson & L. Wagoner, *A Summary of the Laws of the Several States Governing I. Marriage and Divorce of the Feebleminded, the Epileptic and the Insane II. Asexualization III. Institutional Commitment and Discharge of the Feebleminded and the Epileptic* (1914).

Segregation

"Should the institution at any time not be able to accommodate all who should be admitted thereto under this Section, preference in admission shall be given to children and *women of child bearing age.*"[2] Enacted by Act of Sept. 12, 1969, No. 774, § 2, 1969 Ala. Acts 1384, 1385, *remains in effect*: Ala. Code § 22-52-51 (1984).

The Arkansas Mental Retardation Act, in its list of statutory definitions, defined "child" or "children" to mean "mentally deficient persons without regard to chronological age." Enacted by Act of Jan. 25, 1955, No. 6, § 1, 1955 Ark. Acts 11, repealed by Act of Feb. 3, 1983, No. 37, § 1, 1983 Ark. Acts 80, codified at Ark.

---

[1] For a more complete history of the States' first actions in segregating people with mental retardation, see Appendix to the *Amici* brief of the Association for Retarded Citizens, et al.

[2] All italics supplied by *Amici*.

Stat. Ann. § 59-1002.1 (Supp. 1983). (General Assembly acknowledged such language to be "inappropriate and offensive.")

"In the case of adult *females between the ages of 16 and 45* years, any person may file . . . that she is idiotic or feebleminded . . . that she is a *menace to society* . . . ." Enacted by Act of Mar. 4, 1911, ch. 192, § 2, 1911 Ind. Acts 471, 471-72, repealed by Act of Mar. 9, 1939, ch. 119, § 6, 1939 Ind. Acts 578, 581.

"[N]o feebleminded female shall be mantained at the county poor farm. All care of such *feebleminded females* must secure their protection and *segregation.* It shall be the first duty of boards of supervisors in extending care and protection to feebleminded persons, to *prevent the propagation of the feebleminded.* Enacted by Act of Apr. 3, 1920, ch. 210, § 28, 1920 Miss. Laws 288, 300, *remains in effect* Miss. Code Ann. § 41-21-43 (1972). The statutory definition of "feebleminded" includes "constitute *menaces* to the happiness or safety of themselves or of other persons in the community . . . ." Enacted by Act of Apr. 3, 1920, ch. 210, § 2, 1920 Miss. Laws 288, 288, repealed by 1984 Miss. Laws ch. 472, § 3. "That the chancery courts have jurisdiction in all cases of legal inquiry in regard to feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority which renders the subjects *unfit for citizenship.*" Enacted by Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294.

"[A]ll feeble-minded persons . . . whose defects prevent them from properly taking care of themselves or who are a *social menace* may be admitted . . . ." Enacted by Act of Mar. 25, 1929, ch. 75, § 22, 1929 Utah Laws 102, 108, repealed by Act of Feb. 17, 1983, ch. 314, § 1, 1983 Utah Laws 1224.

Marriage Restrictions

"Any person who *aids or abets the marriage of any feeble-minded person,* or attempts to marry, or aid or

abet any attempted marriage with an idiot . . . shall be fined not less than fifty dollars nor more than five hundred dollars." Enacted by Act of Mar. 19, 1928, ch. 156, 1928 Ky. Acts 534, *remains in effect* Ky. Rev. Stat. Ann. § 402.990(2) (Baldwin 1984).

"No *woman under the age of forty-five* years, or a man of any age, except he marry a woman over the age of forty-five years, either of whom is . . . feebleminded . . . , shall hereafter intermarry or marry any other person within this state." Enacted by Act of Mar. 11, 1903, ch. 220, § 1, 1903 Kans. Sess. Laws 373, 373-74, repealed by Act of Apr. 7, 1977, ch. 123, § 1, 1977 Kan. Sess. Laws 529.

"Any person of sound mind who shall intermarry with such insane person or idiot or person who has been so confined as a feebleminded, imbecile or insane patient, or who has been so adjudged insane, feebleminded or an imbecile, . . . , or who shall advise, *aid*, *abet*, cause, procure or assist in procuring any such marriage . . . , is *guilty of a felony* and . . . shall be punished by a fine of not more than $1,000.00 or by imprisonment in the state prison not less than 1 year nor more than 5 years, or by both such fine and imprisonment." The 1905 amendment added the punishments by fine and/or imprisonment. Act of May 25, 1905, No. 136, § 1, 1905 Mich. Pub. Acts 185, 186, *remains in effect* Mich. Comp. Laws Ann. § 551.6 (West 1967). As originally enacted in 1846 Mich. Pub. Acts ch. 83, § 6, this section previously read: "No white person shall intermarry with a negro, and no insane person or idiot shall be capable of contracting marriage." Historical Note to § 551.6.

"It shall be unlawful for any person to cohabit with or attempt sexual intercourse with a female who is feebleminded . . . . Anyone convicted of either of these crimes, shall, upon conviction thereof, be punished by a *fine* of not less than one thousand dollars, or an *imprisonment* of not less than one year in the penitentiary, or by both

such fine and imprisonment." Enacted by Act of Apr. 3, 1920, ch. 210, § 29, 1920 Miss. Laws 288, 300, *remains in effect* with minor changes Miss. Code Ann. § 41-21-45 (1972).

"Marriages . . . between persons, either one of whom is feeble minded, are *incestuous and void* from the beginning . . . ." Enacted by Act of Feb. 11, 1919, ch. 6, § 1, 1919 Mont. Laws 15, repealed by Act of May 6, 1975, ch. 536, § 45, 1975 Mont. Laws 1514, 1533.

"No person who has been adjudged an imbecile, or a feebleminded person . . . shall marry in this state, *until after he or she has submitted to an operation for sterilization.*" Enacted by Act of Apr. 26, 1923, ch. 40, § 1, 1923 Neb. Laws 154, repealed by Act of May 7, 1971, LB728, § 1, 1971 Neb. Laws LB728, 1.

"No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of forty-five years, either of whom is a common drunkard, habitual criminal, imbecile, feeble minded person, idiot or insane person, or person who has theretofore been afflicted with hereditary insanity, or who is afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, shall hereafter intermarry or marry any other person within this state." Enacted by Act of Mar. 17, 1909, ch. 174, § 1, 1909 Wash. Laws 633, 633-34. Amended to exclude age limitation but adding "*unless it is established that procreation is not possible* by the couple intending to marry." Act of Apr. 24, 1973, ch. 154, § 27, 1973 Wash. Laws 1st Ex. Sess. 1118, 1134-35, repealed by Act of May 4, 1979, ch. 128, § 4, 1979 Wash. Laws, 1st Ex. Sess. 1396, 1397-98.

"[A]ny marriage where either of the parties thereto is an idiot or a lunatic at the time of such marriage, shall be absolutely void, and *no life estate* . . . shall be assigned to any widow . . . and *the issue of such marriage*

shall be deemed illegitimate and subject to all the disabilities of such issue." Enacted by 1896 R.I. Pub. Laws ch. 191, § 5, *remains in effect* with minor changes R.I. Gen. Laws § 15-1-5 (1956).

Involuntary Sterilization

A petition for the sterilization of any mentally retarded person living in an institution may be made when "considered in the best interest of the mental, moral, or physical improvement of the resident or patient, or *for the public good* . . . ." Enacted by Act of Feb. 18, 1929, ch. 34, § 1, 1929 N.C. Sess. Laws 28, *remains in effect* with minor changes N.C. Gen. Stat. § 35-36 (1984).

"It is hereby declared to be the policy of the state to prevent the procreation and increase in number of feebleminded and insane persons, idiots, imbeciles, moral degenerates and sexual perverts, likely to become a menace to society or wards of the state. The provisions of this act are to be liberally construed to accomplish this purpose." Enacted by Act of May 22, 1929, No. 281, § 1, 1929 Mich. Pub. Acts 689, 689-90, *as amended by* Act of Apr. 30, 1962, No. 106, § 1, 1962 Mich. Pub. Acts 95, 96, repealed by Act of Aug. 6, 1974, No. 258, § 1106(a), 1974 Mich. Pub. Acts 911, 993-94.

Department of health and environmental control may grant upon petition an order to sterilize "such inmate [who] is . . . idiotic, imbecile, feeble-minded . . . and [that] by the laws of heredity is or would be the probable potential parent of *socially inadequate offspring* likewise afflicted . . . ." Enacted by Act of May 17, 1935, No. 304, § 1, 1935 S.C. Acts 428, 429, *remains in effect* S.C. Code Ann. § 44-47-50(a) (1976).

Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS
CLERK

No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS

RENEA HICKS
Counsel of Record
DIANE SHISK
ADVOCACY, INC.
7700 Chevy Chase Drive
Suite 300
Austin, Texas 78752
(512) 475-5543
Attorneys for Respondents

Of Counsel:
ARLENE KANTER
CARYL OBERMAN

February, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

53

STATEMENT OF QUESTIONS PRESENTED

1. Whether the City's intentional discriminations against mentally retarded persons, in its zoning ordinance on its face and in its denial of a special use permit, deny equal protection of the laws: (a) because they cannot withstand the rationality standard of judicial review; or (b) because they cannot withstand a higher standard of judicial review?

2. Whether exclusionary zoning classifications based on mental retardation are subject to heightened judicial scrutiny under the Equal Protection Clause?

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I. The Zoning Ordinance On Its Face And The Special Use Permit Denial Both Violate The Equal Protection Clause, Even When Measured Against The Rational Basis Standard	9
A. The Zoning Ordinance's Facial Discrimination Against Mentally Retarded Persons Is Not Rationally Related To Legitimate Governmental Objectives	10
B. The Denial Of The Special Use Permit, Primarily Motivated By The Mental Retardation Of The Group Home's Potential Residents, Was Not Rationally Related To Legitimate Governmental Objectives	21
II. Mental Retardation Is A Quasi-Suspect Classification	25
A. Mentally Retarded People Demonstrate The Characteristics That Historically Have Warranted Middle Tier Protection	25
B. Recent, Sporadic Public Policy Successes On Behalf Of Mentally Retarded Persons Do Not Mean That Deep-Rooted, False Stereotypes Have Been Extirpated And That The Conditions Calling For Heightened Scrutiny Are Not Present	36

TABLE OF CONTENTS—Continued

Page

C. Use Of Heightened Judicial Scrutiny For Classifications Based On Mental Retardation Will Not Invalidate All Laws That Make Such Classifications 38

III. Neither The Zoning Ordinance On Its Face Nor The Special Use Permit Denial Can Survive The Scrutiny Required When A Quasi-Suspect Classification Has Been Made 42

CONCLUSION 44

TABLE OF AUTHORITIES

Cases: Page

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) .. 6
Alexander v. Choate, 105 S.Ct. —— (1985) 37
Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976) .. 17
Bernal v. Fainter, 104 S.Ct. 2312 (1984) 39
Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) 22, 31, 37
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) .. 27
Brown v. Board of Education, 347 U.S. 483 (1954) .. 28
Buchanan v. Warley, 245 U.S. 60 (1917) 17
Buck v. Bell, 274 U.S. 200 (1927) 27
Cabell v. Chavez-Salido, 454 U.S. 432 (1982) 39
Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 2694 (1984) 10
City of New Orleans v. Dukes, 427 U.S. 297 (1976) 38
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 17
Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948) 6
Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn. 1981) 17
Craig v. Boren, 429 U.S. 190 (1976) 39, 42, 44
Crowley v. Knapp, 94 Wis.2d 421, 288 N.W.2d 815 (1980) 17
Dandridge v. Williams, 397 U.S. 471 (1970) 40
Eubank v. City of Richmond, 226 U.S. 137 (1912) .. 16
Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 25
Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980) 12
Frontiero v. Richardson, 411 U.S. 677 (1973) 37
Fullilove v. Klutznick, 448 U.S. 448 (1980) 39-40
Garrity v. Gallen, 522 F.Supp. 171 (D.N.H. 1981) .. 37
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) .. 14
Hernandez v. Texas, 347 U.S. 475 (1954) 34
Hunter v. Erickson, 393 U.S. 385 (1969) 6
In re Griffiths, 413 U.S. 717 (1973) 25

TABLE OF AUTHORITIES—Continued

	Page
J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, 274 S.E.2d 174 (1981)	17
Kastendike v. Baltimore Association for Retarded Children, Inc., 267 Md. 389, 297 A.2d 745 (1972)	12
Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)	41
Kremens v. Bartley, 431 U.S. 119 (1977)	28
Lalli v. Lalli, 439 U.S. 259 (1978)	39
Lindsey v. Normet, 405 U.S. 56 (1972)	19, 42
Linn County v. City of Hiawatha, 311 N.W.2d 95 (Iowa 1981)	17
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	18
Loving v. Virginia, 388 U.S. 1 (1967)	41
Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission, 242 Ga. 484, 314 S.E.2d 218, *appeal dismissed*, 105 S.Ct. 57 (1984)	17
Mathews v. Lucas, 427 U.S. 495 (1976)	39
Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981)	39
Mills v. Habluetzel, 456 U.S. 91 (1982)	39
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)	16, 26, 27, 43, 44
Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981)	17
New York v. Uplinger, 104 S.Ct. 2332 (1984)	6
O'Connor v. Donaldson, 422 U.S. 563 (1975)	9
Palmore v. Sidoti, 104 S.Ct. 1879 (1984)	17
Parham v. Hughes, 441 U.S. 347 (1979)	28, 33
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)	27, 28
Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D.Pa. 1972)	31
Plyler v. Doe, 457 U.S. 202 (1982)	29, 34, 42, 44
Reed v. Reed, 404 U.S. 71 (1971)	19

TABLE OF AUTHORITIES—Continued

	Page
Rogers v. Lodge, 458 U.S. 613 (1982)	6
Rostker v. Goldberg, 453 U.S. 57 (1981)	39
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	28, 34
Schweiker v. Wilson, 450 U.S. 221 (1981)	18, 20
Skinner v. Oklahoma, 316 U.S. 535 (1942)	41
Society for Good Will to Retarded Children, Inc. v. Cuomo, 572 F.Supp. 1300 (E.D.N.Y. 1983)	36
State ex rel. Region II Child and Family Services, Inc. v. District Court of the Eighth Judicial District, 609 P.2d 245 (Mont. 1980)	17
State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928)	16
Tancil v. Woolls, 379 U.S. 19 (1964)	39
Tigner v. Texas, 310 U.S. 141 (1940)	26
Trimble v. Gordon, 430 U.S. 762 (1977)	39
United States v. Arthur Young & Co., 104 S.Ct. 1495 (1984)	10
United States v. Carolene Products Co., 304 U.S. 144 (1938)	28
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)	12, 19, 20, 42
Vance v. Bradley, 440 U.S. 93 (1979)	19, 20
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	12
Washington v. Davis, 426 U.S. 229 (1976)	6, 29
Watson v. City of Memphis, 373 U.S. 526 (1963)	26
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)	15, 39
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980)	43
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	6
Youngberg v. Romeo, 457 U.S. 307 (1982)	27
Zobel v. Williams, 457 U.S. 55 (1982)	9, 18

Constitutions, statutes, ordinances and regulations:

Tex. Const. art. VI, § 1	33
Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000, *et seq.*	36
Education of the Handicapped Act, 20 U.S.C. § 1400, *et seq.*	22, 31, 36, 37

TABLE OF AUTHORITIES—Continued

	Page
Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794	36
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)	37
Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann. art. 5547-300 (Vernon Supp. 1985)	36
Tex. Elec. Code Ann. art. 5.01 subdiv. 2 (Vernon 1967)	33
Tex. Elec. Code Ann. art. 5.01 subdiv. 2 (Vernon Supp. 1985)	33
1915 Tex. Gen. Laws 143	31
1887 Cal. Stat. ch. 57	30
Cleburne, Texas, Zoning Ordinance	*passim*
42 CFR § 442.400 *et seq.* (1983)	23
42 CFR § 442.447 (1983)	23
Tex. Elec. Op. DAD-27 (1982)	33
43 Fed. Reg. 6043 (1978)	23
6 Tex. Reg. 2574 (1981)	24
6 Tex. Reg. 3012 (1981)	24
7 Tex. Reg. 53 (1982)	24
7 Tex. Reg. 1641 (1982)	24
9 Tex. Reg. 2139-60 (1984)	23
9 Tex. Reg. 2148 (1984)	23

Other authorities:

American Association on Mental Deficiency, *Classification in Mental Retardation* 1 (H. Grossman, Ed. 1983)	28
Burgdorf and Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977)	27
S. Gould, *The Mismeasure of Man* (1981)	27, 33
Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977)	26

TABLE OF AUTHORITIES—Continued

Page

Linn and Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 Gonzaga L. Rev. 625 (1978) 32

Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979) 33

O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20 (1956) 32

R. Sheerenberger, *A History of Mental Retardation* (1983) 32

Sherlock and Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. Rev. 943 (1982) 32

P. Tyor and L. Bell, *Caring for the Retarded in America: A History* (1984) 31

P. Williams and B. Shoultz, *We Can Speak for Ourselves: Self Advocacy for Mentally Handicapped People* (1984) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-468

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS

The respondents, Cleburne Living Center, Inc. (now known as Community Living Concepts, Inc., and hereinafter referred to as "CLC"), Jan Hannah, and Advocacy, Inc., submit this brief in support of the Fifth Circuit's judgment and in response to the Brief for Petitioners filed by the City of Cleburne, Texas, and five of its officials (hereinafter "the City" or "Cleburne").

STATEMENT OF THE CASE

This case raises a single but crucial issue for mentally retarded American citizens who "historically have been subjected to exclusion from the political process" and "isolated in remote, stigmatizing living arrangements." (J.A. 95, Trial Finding 32). May a city constitutionally use its zoning power to deny thirteen people the oppor-

tunity of living in a supervised group home in an apartment house district, simply because they are mentally retarded? The City of Cleburne's denial of this opportunity—to live in the first group home for retarded persons in the history of this city of nearly twenty thousand people (J.A. 94, Trial Finding 31; T. 18)—shut off access in Cleburne to what the trial court found to be "the principal community living alternative[] for persons who are mentally retarded[,]" and denied to the group home's thirteen prospective residents what the trial court determined is "an essential ingredient of normal living patterns" for retarded people (J.A. 94, Trial Finding 30).

CLC is a small Texas corporation whose purpose is the establishment and operation of group homes for persons who are retarded (J.A. 88, Trial Finding 1). In July, 1980, it began searching for an appropriate, available location in Cleburne for a group home to be operated as a "Level I Intermediate Care Facility for the Mentally Retarded (ICF/MR)," in accordance with Texas and Federal Regulations (T. 62-63).

It found and leased a large, four-bedroom house at 201 Featherston (J.A. 31-32, 92, Trial Finding 21; T. 63),[1] in a Cleburne area zoned R-3 for high density residential uses (J.A. 90, Trial Finding 10). In response to CLC's inquiries, the City classified the planned group home as a "hospital for the feeble-minded" under its 1965 zoning ordinance, after consulting nothing more than a dictionary to determine what constituted "feeble-mindedness." (J.A. 69; T. 366). As a consequence of its use classification, the group home was not a permitted use, despite the fact that such uses as hospitals, public

---

[1] The City's suggestion that another, more appropriate location for an ICF/MR was available, *see* City's Br. 7 n.6, 26-27, is incorrect. The only city official who looked at it did not know if it could have met state standards (J.A. 46-47). It did not and, according to Texas officials, never would have (J.A. 48; T. 370).

schools, boarding houses, nursing homes, homes for delinquent juveniles, and halfway houses for paroled felons were permitted at the 201 Featherston location (J.A. 60-61; T. 276-77). A Texas Department of Health architect inspected the house, finding it adequate for its intended use (J.A. 73-74). A detailed comparison of the state's minimum space requirements for ICF/MR's with the 201 Featherston house determined that the house exceeded them in every respect (J.A. 76; T. 79; explained at T. 74-75, 77-78, 177-80).

The City's classification relegated CLC to seeking a one-year special use permit for the group home. Through its special use permit application, CLC presented the City with the following situation: The 201 Featherston home is on a larger corner lot near downtown Cleburne (T. 67). Abutting it to the south is a two-story apartment house, and across the street to the northeast is a dentist's office. Across the street is a public junior high school, which itself has among its students thirty mentally retarded children (J.A. 8 ¶ 18 & 19 ¶ 18; 92, Trial Finding 21). A public park and recreation facility, the public library, and the central business district are all within walking distance of the house (J.A. 75; T. 59, 175-77). The City's fire department is within less than a minute's response time (P.Ex. 14, T. 7). The house itself, which is on a 16,700 square foot lot with front, side, and back yards, is a one-story home with approximately 2,700 square feet of interior living space (T. 73, 133).[2] It also has a large, covered front porch stretching along two sides of the house (J.A. 8 ¶ 18 & 19 ¶ 18).

The residents would work at ordinary jobs in the community or in workshops (T. 66-68), and through living

---

[2] The City's brief incorrectly states the size as 2,510 square feet, ignoring the testimony on this point (T. 73, 133) and the fact that D. Ex. 12 (J.A. 82-83) fails to list the square footage for all the interior portions of the house.

at the house, could exercise and increase their skills in such areas as independent living, work, and the use of community resources (T. 62, 66-70). Many of them would be from backgrounds of prolonged institutionalization or of highly protective family home environments (T. 70-72). Like ordinary residents, their stay would be voluntary and indefinite (T. 67). Staff members would be present around the clock, but none would live in the house (T. 112, 182).

Motivated primarily by the potential residents' retardation, the City's Planning and Zoning Commission voted in August to deny the special use permit (J.A. 94, Trial Finding 29). CLC then undertook an education campaign to overcome the prejudice by offering each of the city council members special packets of information about retardation and group homes and inviting them to tour the Featherston house (T. 179-181, 184-185). The council members were unresponsive to the tour invitation (T. 185) and the education effort. None of the three council members who voted against the permit had learned, even by the time of trial, the most basic rudiments of what retardation is. Councilmember Bass testified as follows:

Q. Well, what is mental retardation?
A. I don't know.
Q. Did you know at the time?
A. No.
Q. Did you make any effort to find out?
A. No.
Q. Before your vote?
A. No.
Q. Do you know now?
A. No.

Q. Have you learned any more about mental retardation since your vote?

A. Very little, if any.

(J.A. 24). Councilmember Johns testified:

Q. Do you know what mental retardation is?

A. Technically speaking, no.

Q. Well, what's your idea of what it is?

A. Technically speaking, I don't—I don't know . . .

Q. Well, I'm not speaking technically. I'm asking you what your idea of mental retardation is.

A. I would rather not guess, because I don't know.

. . . .

A. I don't think you would use the word "mentally retarded" if they weren't different from you.

Q. Well, what difference do you see?

A. I really don't know. I would say mentally unbalanced or something of that nature. I don't know what it means. I'm not a doctor.

(J.A. 27). Councilmember Martin testified:

Q. Can you tell the Court what mental retardation is? In your mind what it is?

A. I guess it would be unstable.

(J.A. 30).

In mid-October, the city council voted three to one to deny the permit, and shortly thereafter this litigation ensued. Both the trial court and the Fifth Circuit determined that the City's zoning ordinance intentionally discriminated against retarded people (J.A. 93, Trial Finding 24; 726 F.2d at 200, J.A. 131-32).[3] The Fifth

[3] This determination of intentional discrimination against retarded persons, as well as the finding of intentional discrimination against them in the denial of the special use permit (J.A. 94, Trial Finding 29), having been concurred in by both courts below, is

Circuit, however, rejected the trial court's legal determination that such intentional discrimination is permissible and, applying heightened judicial scrutiny, invalidated the ordinance on its face and as applied. The City now

---

binding on this Court in the absence of a "very exceptional showing of error," *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 (1948). *See also Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (Court is reluctant to disturb such fact findings). Each of the determinations also was a necessary prerequisite to establishing a violation of the Equal Protection Clause. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976). The City challenged neither determination before the Fifth Circuit, and the questions which it successfully asked this Court to review on certiorari did not embody such a challenge. Indeed, the necessary predicate for the questions' consideration is that intentional discrimination occurred. Therefore, the legitimacy of the findings of intentional discrimination are not even before the Court for review. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Nonetheless, the City liberally sprinkles its brief with claims that it did not intentionally discriminate against retarded persons in either aspect of the case. *See, e.g.*, City's Br. 28-29 (disagreeing with Fifth Circuit's determination that there was intentional discrimination on the face of the ordinance), *and* City's Br. 28 (claiming that special use permit denial "has nothing to do with discrimination[]"). Such unsupported arguments are irrelevant to the case as it has been accepted for review and will not be briefed by the respondents. It should be noted, however, that the ordinance imposes substantially more onerous administrative processes to permit retarded people's residence in group homes—required recurrently every year, even when initially administratively successful. This imposition is an impermissibly adverse classification, just as the special processes imposed on blacks in *Hunter v. Erickson*, 393 U.S. 385 (1969), were impermissible. *See also Yick Wo v. Hopkins*, 118 U.S. 356, 366, 370 (1886).

If for some reason the Court is inclined to delve into the findings of intentional discrimination and try to resolve the case on such grounds instead of reaching the significant issues before it that are premised on the validity of such findings, it should resist. Instead, it simply should dismiss the writ as improvidently granted because the cause will have become "an inappropriate vehicle for resolving the important constitutional issues raised by the [petitioners]," *New York v. Uplinger*, 104 S.Ct. at 2332, 2334 (1984).

seeks reversal of the Fifth Circuit's decision on each of two matters: whether the zoning ordinance's facially discriminatory treatment of retarded people denies them equal protection of the laws; and, if it does not, whether the City's denial of the special use permit, found by the trial court to be motivated primarily by the retardation of the group home's residents, is constitutional.

SUMMARY OF ARGUMENT

The crux of this case is whether the mere possession of the trait of mental retardation makes a citizen less entitled to live meaningfully in an American community. The City of Cleburne, through its zoning powers, unconstitutionally has answered the question "yes." Using retardation as its justification, it has denied a group of retarded people access to the community by denying them the opportunity to live in what the trial court determined to be the principal community living alternative for them. The same number of virtually any other group of people—elderly people in nursing homes, tuberculosis patients in sanitariums, boarders, juvenile delinquents and paroled felons in halfway houses—are permitted to live together at the same place where retarded people were denied this opportunity. The Equal Protection Clause prohibits the City's blatantly exclusionary actions under whatever analytical standard the Court may employ.

The City's discriminatory actions were unconstitutional because they are not rationally related to any legitimate interest it claims it is furthering. The record is devoid of any substantiating basis for the zoning ordinance's discriminatory treatment of retarded people. In what are transparently *post hoc* rationalizations, the City has offered two principal justifications for its discriminatory ordinance, each of which is unsupportable. First, the ordinance is not aimed at protecting the well-being of retarded residents of group homes. It has no standards for implementing such protection, and it is administered

by people who admittedly know nothing about mental retardation and show no interest in learning. The only standards contained in the applicable portion of the ordinance are vague ones directed to the neighbors' interests.

Second, the record, including expert testimony, demonstrates that there is no connection whatever between possible legitimate interests of the neighbors—in traffic congestion, fire safety, and population densities—and the exclusion from the high density residential neighborhood of a group home for retarded people. Instead, the record demonstrates that the ordinance protects only one interest of the neighbors—the illegitimate one of simply not wanting to live near a group of retarded people.

The City's denial of the special use permit is invalid for similar reasons. As the trial court found, the permit denial was motivated primarily by the retardation of the group home's potential residents. The Equal Protection Clause does not permit the validation of an invidiously discriminatory action through the tautological argument that the action's objective was to discriminate.

Mental retardation is a quasi-suspect classification. The City's discriminatory actions and attempted justifications for them present a microcosm of why discriminatory, exclusionary actions against people who are retarded should be subjected to heightened judicial scrutiny under the Equal Protection Clause. Retarded people have been subjected to a long history of purposeful, unequal treatment; they have been isolated in remote, stigmatizing living arrangements; they have been politically powerless; and, through it all, they have been the victims of a thoroughgoing stigmatization based on an immutable trait acquired through no fault of their own.

Their literal and figurative isolation has been both the cause and the effect of the persistence of false and harmful stereotypes of who they are and what they can accomplish. These false stereotypes, mirrored here by the

City's reaction to the proposed group home, cause official action concerning retarded people to be misdirected. They are a central reason why the Court should view with suspicion official discriminatory actions against retarded people. A heightened scrutiny of classifications based on retardation will not invalidate all such classifications, but it will help insure that they are not based on false, archaic stereotypes.

The City's actions here clearly were based on such stereotypes. People who are retarded are entitled at a minimum under the Equal Protection Clause to have meaningful access to the community of citizens on an equal footing with other citizens.

ARGUMENT

I. The Zoning Ordinance on Its Face and the Special Use Permit Denial Both Violate the Equal Protection Clause, Even When Measured Against the Rational Basis Standard

The respondents first address whether the City's zoning actions can survive even the lower tier of scrutiny under the Equal Protection Clause for two reasons. First, although we believe that heightened scrutiny is fully warranted by the history of invidious discrimination against retarded people and by the other traditional indicia of suspectness, *see* Part II, *infra*, the City's zoning actions cannot pass even the minimum rationality test. Thus, the Court can find the City's actions unconstitutional without resolving the question of which tier of scrutiny is appropriate for discriminations based on mental retardation. *Cf. Zobel v. Williams*, 457 U.S. 55, 60-61 (1982) (if the scrutinized scheme cannot pass the minimal test, the Court need not decide whether enhanced scrutiny is appropriate); *O'Connor v. Donaldson*, 422 U.S. 563, 573

(1975).[4] Second, the City's reaction to the proposed operation of a group home for retarded people casts a revealing light on why classifications discriminating on the basis of mental retardation should receive heightened judicial scrutiny. The details set out here about the City's actions crystallize for the Court the legacy of this Nation's historical attitudes towards retarded persons: their exclusion from the community of citizens on the basis of unexamined, false stereotypes about them.

A. *The Zoning Ordinance's Facial Discrimination Against Mentally Retarded Persons Is not Rationally Related to Legitimate Governmental Objectives*

The zoning scheme here is uniquely invidious. Permitted uses in an R-3, "Apartment house district" in the City of Cleburne include apartment houses, multiple dwellings, boarding and lodging houses, fraternity houses,

---

[4] This case's core issue is the reach of the Equal Protection Clause when intentional discrimination against retarded people has been established. The rationality of the City's actions has been questioned at all stages of this litigation, and it is appropriate for the Court to decide the question. *See Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2699 (1984); *United States v. Arthur Young & Co.*, 104 S.Ct. 1495, 1501 n.12 (1984).

The United States, as *amicus curiae*, repeatedly raises the possibility that the City's zoning actions are unconstitutional because irrational. *See, e.g.*, U.S. Br. 6 (appellate court "may well supportably conclude" that special use permit denial was irrational"); U.S. Br. 7 n.2 (noting weakness of City's zoning decision in light of community benefits from community living arrangements for retarded people); U.S. Br. 10 ("entirely possible . . . that this very case represents . . . an irrational and invidious choice"). Yet, it ignores the preceding principles and suggests sending the case back to the Fifth Circuit for consideration of the rationality question. No party to the litigation has urged this unnecessary dilatory procedure, *see, e.g.*, City's Br. 43 (urging, *inter alia*, that the zoning actions be found constitutional under the rational basis test), and the Court should reject it.

dormitories, apartment hotels, eleemosynary institutions (other than penal institutions), and

> Hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the insane or feebleminded or alcoholics or drug addicts.*

Cleburne Zoning Ordinance, § 8(6) (emphasis added) (J.A. 61). When CLC notified the City that it planned to operate a group home for retarded people in an apartment house district, the City consulted a dictionary (T. 366), ascribed its confusion over the proper classification of the group home to the "oversight . . . of the authors" of the zoning ordinance (T. 355), and decided that the group home, despite having no doctors or nurses on its staff (T. 182-83), would be treated under subdivision 9 of Section 16 of the zoning ordinance as a *hospital* for the feeble-minded which could not operate unless it obtained a special use permit.

The residents' mental retardation was the motivation for this unusual and burdensome requirement. The trial court found as a fact that "[i]f the potential residents . . . were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." (J.A. 93, Trial Finding 24). The Fifth Circuit reached the same conclusion: "The same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." (J.A. 131-32). Furthermore, the house could be used not only for a group home, but also for a nursing home, a fraternity, a hospital, or a sanitarium. Assuming for the moment that heightened scrutiny is inappropriate, the question for the Court is whether the ordinance's facial discrimination against mentally retarded people is consistent with the Equal Protection Clause under what has come to be known as the minimal rationality test enunciated in cases such as

United States Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) ("a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest").[5] Treating mentally retarded people differently from the elderly, the sick, or, for that matter, transients in boarding homes or students in a fraternity house, has no rational basis in an area zoned for multiple occupancy. It is, rather, a product of precisely the kind of prejudice, based on irrational fears, which the Equal Protection Clause has never permitted.

Certainly, a city has legitimate objectives in the health and safety of its residents and in the character of its neighborhoods. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The objectives posited here by the City—the lessening of congestion in the streets, securing safety from "fire and other dangers," the avoidance of undue concentrations of population, "the well being of the [group home's] residents" and the "interests of the surrounding neighbors[,]" City's Br. 24—may, in some contexts, be legitimate objectives of the zoning ordinance as a whole. However, they are not a legitimate basis for excluding group homes for the retarded from all of Cleburne's R-3 districts.

The absence of a rational relationship between the classification at issue here—singling out retarded people

---

[5] Courts already have employed the same or similar standards to invalidate official discrimination against retarded people or to find distinctions such as those drawn in the ordinance baseless. In *Fowler v. United States*, 633 F.2d 1258 (8th Cir. 1980), the court, without deciding whether a higher level of scrutiny was demanded, employed the rational basis test to invalidate a federal employment classification drawn on the basis of mental retardation. In *Kastendike v. Baltimore Association for Retarded Children, Inc.*, 267 Md. 389, 297 A.2d 745 (1972), Maryland's highest court found a zoning distinction between nursing homes and group homes for retarded people—a type of zoning distinction drawn here by the city—"inconsequential." *Id.*, 297 A.2d at 750.

for discriminatory treatment—and three of the posited objectives is easy to establish. First, nothing in the record or in the City's brief even remotely suggests that thirteen retarded people living in a group home would cause any more congestion in Cleburne than a group of thirteen people who are not retarded. The residents of the CLC group home probably would not drive their own cars (J.A. 93, Trial Finding 23). Nothing in the record suggests that they have a special propensity to slow traffic. Second, nothing in the record suggests a connection between requiring a special use permit for group homes for retarded people but not for most other congregate living situations and an increase in fire safety. The record is barren of evidence that retarded people are more likely than others to start fires. Indeed, from the outset, the City admitted that there is no connection between dangerousness and mental retardation (J.A. 7 ¶ 14 & 18 ¶ 14).[6] Finally, the special use permit requirement is unrelated to the regulation of population densities. It regulates the IQ scores, not the number, of residents in an apartment house district.

The City's other two posited objectives for the comparatively harsher treatment of retarded people are even more attenuated, and, like the three objectives just discussed, are limited to general purposes: protection of the health, safety and welfare of, on the one hand, mentally retarded people and, on the other, the City residents. Neither asserted interest has been connected in the least to the specific ordinance; nor has the City ever explained how it expected to carry them out.

---

[6] The City ordinance's treatment of the fire safety question further suggests that fire safety concerns played no part in the City's discriminatory treatment of group homes. The City code made special fire safety provisions for two permitted uses in R-3 districts—nursing homes and convalescent homes. *See* P.Ex. 15, T. 7. There is no similar provision for group homes for retarded people.

The first supposed concern, the protection of residents of the home, is unpersuasive. In Texas, the state has retained and, in many aspects, preempted the authority to assure that mentally retarded people are provided with opportunities for independent living and habilitation in the community. *See* Amicus Curiae Brief for the State of Texas and the Texas Department of Mental Health and Mental Retardation ("State of Texas Br."). Extensive guidelines at the state level regulate ICF/MR's. The City, on the other hand, is not even empowered to license ICF/MRs, and its zoning ordinance contains no standards aimed at insuring the well-being of the residents of group homes for retarded people. Section 16, the zoning provision governing special use permits, sets no standards that allow or encourage the City to structure its special use permit process in a way that would enhance the well-being of occupants of a group home for mentally retarded people. On the contrary, it explicitly addresses itself solely to externalities—that is, the effects of the specially permitted use on "neighboring property." Furthermore, the City has offered no explanation for why it has singled out mentally retarded people to be the recipients of the extra protection purportedly offered by the special use permit requirement, while, for example, leaving unprotected the elderly people who live in nursing homes.

The reason is obvious: the City never contemplated such an objective until after the commencement of this litigation, and even now lacks the power to give it substantive content. In similar circumstances, the Court has refused to presume that a governmental entity was actually furthering an asserted governmental interest when that interest was far removed from its normal responsibilities. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976) (invalidating a civil service rule primarily because the asserted interest was outside the responsibility of the governmental entity asserting it). Since it is clear that the objective of the special use per-

mit could not have been to promote the well-being of the group home's residents, it should be rejected. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (asserted legislative objective may be rejected if it "could not have been a goal of the legislation").

The City's other claimed objective—that of protecting the neighbors' interests by requiring a special use permit —is not, under the circumstances, a legitimate objective. The City gives the Court absolutely no guidance on what the "neighbors' interests" are that it is trying to protect through its special use permit requirement nor what standards exist to judge them. The neighbors' health is not protected by the requirement. Nothing suggests that mentally retarded persons are inherently unhealthy, or that mental retardation is contagious. In contrast, hospitals, which treat many people with communicable diseases, need not obtain a special use permit to locate in the same district. The neighbors' safety is not protected. Retarded people are not dangerous (J.A. 7 ¶ 14 & 18 ¶ 14), and as discussed above, nothing suggests that they are prone to cause fires more than any other group of people. Homes for juveniles who have been adjudicated delinquent and halfway houses for paroled felons are permitted uses (T. 276-77).

The neighbors' only apparent interests are objections to retarded people living in their neighborhood. This concern is evident on the face of the ordinance. It places homes for retarded people in the same category as homes or hospitals for alcoholics, drug addicts, and the insane, penal institutions and all institutions which, rightly or wrongly, create fear because of a known or suspected potential for violence or anti-social behavior among some of their inhabitants.

The inclusion of mentally retarded people in the same group as drug addicts, prisoners, and alcoholics reflects, however, nothing but ignorant, irrational, and tragic prejudice. The record here reflects what is known about

mentally retarded people: they are not dangerous in any sense of the word; they are not anti-social; they threaten no one. *See* Brief of Amici AAMD at 1 n.1 (J.A. 7 ¶ 14, 18 ¶ 14; T. 140, 144-45, 164).

Indeed, the sad irony of this evident justification is that it is a product of the very isolation to which mentally retarded people have been subject for so long. Unaccustomed to mentally retarded people in the neighborhood, the City, like many others, saw them as different, strange and, most of all, threatening. Why else classify retarded people with prisoners, drug addicts, or alcoholics rather than with the elderly in nursing homes, the transient in boardinghouses, or students in fraternity or sorority houses? The classification, therefore, probably does reflect a concern for the safety of the neighborhood, but that concern is misplaced. It is based on illegitimate stereotypes, is itself irrational, and cannot be given effect. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982).

In zoning cases in particular, it is critical not to permit such stereotyped attitudes to prevail through deference to residents' opinions. In *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Eubank v. City of Richmond*, 226 U.S. 137 (1912), this Court held invalid zoning provisions which gave neighbors standardless delegations of power to block proposed uses in their neighborhoods. Although there has been no formal delegation, the City nonetheless is precluded from claiming a legitimate governmental interest in simply capitulating to those vague, undefined "citizens' interests" by requiring a special use permit for group homes for retarded people, but not for other congregate living situations which result in equally intensive uses of property. The Court recently has expressed its unanimous disapproval on constitutional grounds of official discriminatory actions which embody widespread private biases:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Palmore v. Sidoti, 104 S.Ct. 1879, 1882 (1984). *See also Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring) (keeping visibly pregnant women out of sight of children invalid objective); and *Buchanan v. Warley*, 245 U.S. 60 (1917) (exclusionary zoning is impermissible to deny access to neighborhood by disfavored minority group).

Many other municipalities or neighborhoods have voiced objectives such as these in their attempts to restrict group homes for retarded people from areas zoned for single-family residential use.[7] This case does not present the circumstances found in these other cases, where a facially neutral ordinance is challenged as restricting retarded people's access to community living. The City's ordinance is unique in its intent to discriminate on its face and in its exclusion of a group home not from a single family residential district, but from a high density

---

[7] These ordinances, and similar restrictive covenants, have been successfully challenged, often on the ground that retarded people living in a home constitute a "family." *See, e.g., Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *Mongony v. Bevilacqua*, 432 A.2d 661 (R.I. 1981); *J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 274 S.E.2d 174 (1981); *Crowley v. Knapp*, 94 Wis.2d 421, 288 N.W.2d 815 (1980); *State ex rel. Region II Child and Family Services, Inc. v. District Court of the Eighth Judicial District*, 609 P.2d 245 (Mont. 1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976). A case relied upon by the City, *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 252 Ga. 484, 314 S.E.2d 218, *appeal dismissed*, 105 S.Ct. 57 (1984), involved a single family zoning classification, not a high density residential classification. For that reason, and also because it involved no intentional discrimination against retarded persons, 314 S.E.2d at 221, it does not govern the result in this case at all.

residential district. It permits (without requiring a special use permit) a large variety of uses which invite group living, from boardinghouses to apartments to dormitories, and their attendant urban consequences such as congestion, traffic, and the need for increased city services. Further, it permits institutions, including hospitals and sanitariums, without special use permits. In judging the reason provided by the City for the difference in treatment, many of the broad, legitimate concerns any municipality has in restricting uses in single-family neighborhoods have little bearing in this case or must be viewed within the context of high density rather than single family neighborhoods.

At this advanced stage of the litigation, the City has yet to articulate any more than the vaguest and most general objectives for its discriminatory treatment of mentally retarded people on the face of its ordinance. Even then, it has failed to establish a meaningful connection between the discrimination and its vaguely stated objectives. The only fair conclusion to draw from the amorphous nature of the City's justifications is that the City's deliberately discriminatory actions were the result of the type of "inadvertence or ignorance," *see Schweiker v. Wilson*, 450 U.S. 221, 236 (1981), which is the hallmark of irrational legislative action. *See also id.* at 239-40 and 244 (Powell, J., dissenting) (condemning legislative distinctions drawn "thoughtlessly" and expressing skepticism about *post hoc*, unsupported hypotheses about legislative purposes).

The rational basis test under the Equal Protection Clause is "not a toothless one," *Schweiker v. Wilson*, *supra*, 450 U.S. at 234,[8] and there is special reason to

---

[8] Indeed, in the last fifteen years, the Court has invoked it increasingly to invalidate laws. *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982) (distinctions based on length of residency to distribute surplus funds); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422

give it bite in this case without intruding into delicate legislative allocation decisions. Placing group homes for mentally retarded people on an equal footing with such permitted uses as nursing homes, hospitals, public schools, and homes for delinquent juveniles will not impose any additional spending requirements on Cleburne or require it to reallocate its resources in any way. It might even result in a net savings to taxpayers. *See* U.S. Br. 7 n.2. At the same time, it will give mentally retarded people access to the community by making available to them their "principal community living alternative[]" (J.A. 94, Trial Finding 30). The failure to compel the availability of such access would undercut in two ways the principles underlying the Court's usual deference to legislative distinctions as expressed in cases such as *Vance v. Bradley*, 440 U.S. 93 (1979):

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the political process . . .

Id., 440 U.S. at 97 (footnote omitted). The predicate of the *Vance* presumption is markedly absent here. Excluding mentally retarded people from the community necessarily excludes them from having an impact on the political process. At the same time, it insures that the stereotypes that originally gave rise to the antipathy leading to the exclusion will be reinforced. As the Fifth Circuit insightfully wrote:

> Isolated from normal community patterns, [mentally retarded persons] can never hope to adapt. The re-

---

(1982) (state administrative scheme for processing employment discrimination claims; six Justices in two opinions); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (food stamp exclusion based on unrelated members of a household); *Lindsey v. Normet*, 405 U.S. 56 (1972) (double-rent appeal bond requirement in forcible entry and detainer actions); *Reed v. Reed*, 404 U.S. 71 (1971) (statutory preference for male administrators of estates; preceded recognition of gender classifications as quasi-suspect).

> sulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

726 F.2d at 199 (J.A. 129). Therefore, when cases such as this one involving the exclusion of a disadvantaged group arise, the *Vance*-type presumption about democratic rectification of improvident decisions should not be indulged.

Instead, even while employing the rational basis test, the Court must look with a sense of realism at the proffered justifications to determine whether they are anything more than *post hoc* rationalizations unconnected to the original purpose for the challenged classificatory scheme and, if they are, whether they nonetheless comfortably fit the scheme. Here, the City's justifications are transparently *post hoc* rationalizations that do not mesh at all with the challenged zoning scheme. At best, the City's discriminatory requirement that group homes for mentally retarded people obtain a special use permit, while many equally intensive uses are permitted, arose out of ignorance and a thoughtless adherence to archaic stereotypes. At the worst, the City's discriminatory requirement reflects an intent to exclude a group of people based on the unfounded fears of the citizenry. If the latter is the case, then the discriminatory treatment must fall under the principle announced in *United States Department of Agriculture v. Moreno*:

> [I]f the constitutional concept of "equal protection of the laws" means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.

413 U.S. at 534 (emphasis in original). If the former situation is the case, then the very concept of a test of rationality and *Schweiker v. Wilson*'s implicit condemna-

tion of legislative action premised on inadvertence or ignorance likewise means the discriminatory treatment of mentally retarded persons in the City's zoning ordinance must fall.

B. *The Denial of the Special Use Permit, Primarily Motivated by the Mental Retardation of the Group Home's Potential Residents, Was Not Rationally Related to Legitimate Governmental Objectives*

The trial court found that the primary motivation for the special use permit denial was the mental retardation of the group home's potential residents (J.A. 94, Trial Finding 29). It also found that seven subsidiary factors played a role in the permit denial. They were: (1) the neighbors' attitudes; (2) the location of a junior high school across the street from the group home; (3) the fears of the elderly neighbors; (4) the size of the group home and the number of people to reside there; (5) CLC's legal responsibility for the actions of the group home's potential residents; (6) the group home's location in a five hundred year flood plain; and (7) the general presentation CLC made to the city council. (J.A. 95, Trial Finding 34). Of these seven articulated bases for the denial of the special use permit, five are discriminatory on their face and thereby illegitimate.

First, the attitudes of the neighboring property owners were clearly of utmost concern to each of the Ctiy Councilmen who voted against the home (J.A. 25, 29; T. 15, 17). For example, one councilmember testified that he paid particular attention to the neighbors' fears that retarded persons might "walk around and scare people." (T. 41). These attitudes, however, were themselves the products of prejudice, reflected in the absence of any concrete harms the neighbors were able to identify.

Second, the proximity of a junior high school is irrelevant (J.A. 41). The school itself provides educational services to about thirty students who are retarded (J.A.

92), no doubt in furtherance of the national policy of integrating the handicapped with the nonhandicapped enunciated by Congress in the Education for All Handicapped Children Act and as affirmed by this court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The City's speculative and unsupported concern that the students would tease or abuse residents (J.A. 26, 30) cannot be the basis of denial of the group home. As the Fifth Circuit emphasized, this justification is yet another in the many examples of prejudice:

> [i]f we accept that the hostility of junior high school students is a substantial concern, then any hostility may become the justification for denying a use permit. In effect, prejudice becomes its own excuse.

726 F.2d at 202 (J.A. 135).

Third, the unfounded fears of the elderly neighbors, like their hostile attitudes, cannot become the basis of legitimate governmental action. Fourth, the question of CLC's legal responsibility for its intended residents was more than adequately answered by CLC's President in his city council presentation (T. 86-87), and, as the Fifth Circuit noted, no explanation is offered as to why only retarded persons must prove their financial solvency to live in Cleburne, or as to how CLC fell short. 726 F.2d at 202 (J.A. 136). Fifth, the "general presentation" of CLC to the city council as a basis for denial of a special use permit is too vague and ambiguous to serve.

The other two articulated concerns, location of the group home in a five hundred year floodplain and the size and number of residents of the home, appear legitimate on their face. Close examination, however, reveals these too as *post hoc* justifications unrelated to any legitimate governmental purpose.

No relationship was or could be established between retardation and special danger from a flood every five

hundred years. The only council member to testify about this factor indicated that his concern reached to anyone—retarded or not—who might live in Cleburne (J.A. 28). The City itself has defined special flood hazard areas to include only those areas in a one hundred year floodplain P.Ex. 13, T. 7).[9] The house itself is probably wholly outside the floodplain because it is elevated about two feet above ground level (T. 177).

The size of the home and the number of residents are important issues, but they are not rationally furthered by denial of this special use permit. The concerns about size were articulated by the same city council members who admitted they knew nothing about mental retardation. In contrast, a phalanx of state regulatory agencies, parents, experienced professionals, and consumer organizations made the City aware that they supported the home's establishment and had determined that it was adequate to meet the needs of its intended residents. The City's feigned concern, moreover, contrasts with the utter absence of concern for space requirements in the zone for such permitted uses as nursing homes, hospitals, and boardinghouses. Furthermore, CLC demonstrated that the home would exceed all state and federal requirements for size and occupancy (J.A. 73-74; T. 180).[10] The Texas Department of Health confirmed the

---

[9] The federal Guidelines for Implementing Executive Order 11988, regarding floodplain management, require that nursing homes, schools, and hospitals be located outside a 500 year floodplain if the occupants of these buildings are sufficiently immobile that a flood would present a risk of danger. 43 Fed. Reg. 6043 (1978). Residents of the group home would be ambulatory without any assistance (J.A. 93, Trial Finding 22) and thus are not in the high risk group identified by the federal government (T. 66).

[10] The State of Texas has adopted the Federal ICF/MR requirements in all respects, *compare* 9 Tex. Reg. 2139-60 (1984) *with* 42 C.F.R. § 442.400 *et seq.* (1983), including square footage requirements. *Compare* 9 Tex. Reg. 2148 (1984) *with* 42 C.F.R. § 442.447 (1983).

adequacy of the house for thirteen residents (J.A. 73; T. 6-7). Each bedroom exceeded the square footage per resident requirements imposed by the state (J.A. 76; T. 75-79, 179-181). In contrast, the City's concern about size was entirely subjective, consisting wholly of vague and inaccurate characterizations of the house as having very little yard space (J.A. 24, 25, 29) with inadequate space to relax outside (J.A. 29; T. 28). The City introduced no evidence of occupancy or building code requirements that were violated by this group home.

The City later attempted to bolster its size arguments by citing to a state regulation which limits applications for group homes made after May 1, 1982, to six residents. The regulation does not govern the Featherston home because its application was pending prior to this date (J.A. 77; T. 129-31).[11] Although the City purports to be concerned about the welfare of the residents of the group home, the determination by the State of Texas

---

[11] Because there might be some confusion on this point, it should be noted that the letter introduced as P.Ex. 28 (J.A. 77) makes reference to Texas Department of Human Resources (DHR) Rule 326.35.03.004, an emergency rule effective July 13, 1981. *See* 6 Tex. Reg. 2574 (1984). As indicated in the preamble, this rule was adopted because the appropriations for the ICF/MR program would not support further growth. *Id.* The rule did two things: it imposed a moratorium on applications for the ICF/MR program; and it gave those with pending applications a 120 day grace period to complete certification requirements. *Id.* The letter from the DHR Commissioner, P.Ex. 28, tolls the running of this 120 day grace period for CLC until the exhaustion of appeals in this case. The original rule was effective until September 1, 1981, and was reenacted twice in virtually the same form *see*, 6 Tex. Reg. 3012 (1981) and 7 Tex. Reg. 53 (1982), to extend the moratorium until May 1, 1982, the date the rule limiting the size of new ICF/MRs to 6 persons became effective. The City's exhibit, D.Ex. 10 (J.A. 78), is only a *proposed* rule, and, even at that, would be DHR Rule 326.05.03.005 (not 326.05.03.004). A final version of the .005 rule applied only to applications submitted on or after May 1, 1982. *See* 7 Tex. Reg. 1641 (1982). It does not apply to the CLC group home. *See also* State of Texas Br. 15 n.7.

that this home is adequate for its purpose must control. *See* State of Texas Br. 12-16. Furthermore, an expert in the field of mental retardation, Dr. Philip Roos, testified that group homes, which are among the principal community living alternatives for retarded people (J.A. 94, Trial Finding 30), with up to fifteen residents tend to work as well as those for six or fewer residents (T. 161-62).

All of these factors are either impermissible, unfounded, or pretextual, and not one rationally furthers a legitimate governmental interest. Furthermore, overriding these factors is the fact that the City Council's vote was premised primarily on the retardation of the potential residents (J.A. 94, Trial Finding 29). The City cannot justify discriminatory actions by the circular justification that its objective was to discriminate. "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." *In re Griffiths*, 413 U.S. 717, 722 n.8 (1973). *See also Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976) (argument that "discrimination may be justified by a desire to discriminate" is "unpersuasive on its face").

II. Mental Retardation Is a Quasi-Suspect Classification

A. *Mentally Retarded People Demonstrate the Characteristics That Historically Have Warranted Middle Tier Protection*

The circumstances of this case present the most compelling of situations for a vulnerable group to ask the Court to give especially careful scrutiny to official actions intentionally disadvantaging them. It does not involve a situation where retarded people are dissatisfied with their share of public resource allocations among a variety of claimants. Instead, it involves a question of meaningful access to the community in which retarded people have been denied access to what the trial court deter-

mined is the principal community living alternative for persons with mental retardation and an essential ingredient of normal living patterns for them (J.A. 94, Trial Finding 30).

From the outset of this controversy, the City, buttressed by expressions of fear and "vague disquietudes," *Watson v. City of Memphis*, 373 U.S. 526, 536 (1963), from some of the group home's neighbors, chose to categorize people who are retarded as uniformly different from people who are not mentally retarded. The fundamental fallacy of the City's approach led it to misdirect its focus. It acted on false stereotypes about retarded people rather than on what mental retardation really is. And the fallacy persists. The City's brief predictably invokes the oft-repeated adage that the Equal Protection Clause does not require things which are different to be treated as though they are the same, citing *Tigner v. Texas*, 310 U.S. 141, 147 (1940). In this way, the City apparently seeks to shift the Court's focus from a point more deeply rooted in the Equal Protection Clause—despite historical impulses to deny it, people who are retarded are, first of all, people. *Cf.* Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 6 (1977) (discussing inverse relationship between stigma and recognition as a person). They have more than just a disability, they have strengths and abilities. (J.A. 6-7 ¶ 12, 18 ¶ 12; T. 140, 144-45). *See generally* P. Williams and R. Shoultz, *We Can Speak for Ourselves: Self Advocacy for Mentally Handicapped People* (1984).

This Court previously has noted the dangers of failing to examine prevailing stereotypes in equal protection analysis. *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-26 (1982) (warning against use of "fixed" and "archaic and stereotypic" notions concerning the roles and abilities of males and females). To an even greater degree, these same dangers are pres-

ent in this case.[12] It is essential that the Court understand what retardation is and how the false stereotypes about it have been developed. The crux of this case is whether the mere possession of the trait of retardation makes a citizen less entitled to live meaningfully in an American community.

Mental retardation essentially is a problem of learning, which is ameliorable but not curable (J.A. 37-38). *See Youngberg v. Romeo*, 457 U.S. 307, 309 n.1 (1982); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 7 n.2 (1981). The standard definition of retardation is "a significantly subaverage general intellectual function existing concurrently with deficits in adaptive behavior and manifested during the develop-

---

[12] In the past, the judiciary has been an occasional handmaiden to the false stereotyping and stigmatization of retarded people. In *Buck v. Bell*, 274 U.S. 200 (1927), in the course of upholding a compulsory sterilization law, Justice Holmes wrote:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.

274 U.S. at 207. The factual bases for the decision have been severely criticized and largely discredited. *See, e.g.*, Burgdorf and Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995, 1006-08 (1977). There is even substantial doubt whether Carrie Buck, whose involuntary sterilization was at issue, was retarded. *See* S. Gould, *The Mismeasure of Man* 335-36 (1981). This case presents an opportunity for reexamination of the false stereotypes embedded in *Buck*. There is precedent for such reexaminations in the context of cases invoking heightened judicial scrutiny. *See Mississippi University for Women, supra*, 458 at 725 n.10 (commenting on *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873)).

mental period." American Association on Mental Deficiency, *Classification in Mental Retardation* 1 (H. Grossman ed. 1983).[13] As the City necessarily has conceded (J.A. 6-7 ¶ 12 & 18 ¶ 12), it is not a disease, and it is not a mental illness (J.A. 38). *See Pennhurst, supra; see also Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977) ("careful attention must be paid to the differences between mentally ill and mentally retarded"). The retarded are not ill; they do not need to be hospitalized; they do not receive services in "hospitals for the feeble-minded." The different degrees of retardation are grouped into four general categories: mild, moderate, severe, and profound. About ninety-five percent (95%) of the people who are retarded fall within the mild or moderate category (J.A. 39). The CLC group home's potential residents would fit within these two categories of retardation (J.A. 93, Trial Finding 22).

Since 1938, the Court has elaborated a series of interrelated standards to aid it in determining if certain groups of citizens are especially vulnerable to invidious treatment. These concern a combination of historical mistreatment, the majority's deep-rooted misunderstandings of significant aspects of the character and ability of individuals within the targeted group, unavoidable chance, and literal or figurative isolation from the community of citizens.

The Court has employed varying verbal formulations of the standards' components. *See, e.g., Parham v. Hughes*, 441 U.S. 347, 351 (1979) (plurality opinion) (immutability); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (stigmatization); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (discrete and insular minority). In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the

---

[13] The level of intellectual functioning is measured by using standard intelligence tests (J.A. 38). Adaptive behavior typically also is evaluated by using standardized instruments (J.A. 38).

Court discussed the standards in terms of whether the vulnerable group is saddled with disabilities, has been subjected to a history of purposeful unequal treatment, or has been relegated to a position of political powerlessness. 411 U.S. at 28. More recently, the Court has noted in this regard:

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality. . . . Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. . . . The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. . . . Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.

Plyler v. Doe, 457 U.S. 202, 216-17 n.14 (1982).

Regardless of the verbal formulation employed, once the Court determines that the standards fit the group—and that official action purposefully has disadvantaged it, *see Washington v. Davis*, *supra*, 426 U.S. 229—it does not evaluate the challenged action with its usual presumption that the democratic process worked with equal regard for all citizens' status. Instead, the Court determines that, because of the significant likelihood that official action targeting the vulnerable group was misdirected, the action must be viewed with some suspicion. In such circumstances, under the aegis of the Equal Protection Clause, the Court applies a heightened judicial scrutiny to the challenged action.

People who are retarded constitute a group especially vulnerable to misdirected and prejudicial actions by public officials. Heightened judicial scrutiny of official actions disadvantaging them is a constitutional necessity.

Without it, they can be subjected to exclusionary actions which will force them out of the community of citizens. They then would be foreclosed from the opportunity to rectify the community's misunderstandings. Its insight into this point led the Fifth Circuit to begin its analysis with the following observation:

> The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions. . . . [T]he effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. . . . [U]nder those circumstances the danger is great that the statute will reflect and enshrine untrue stereotypes.

726 F.2d at 192 (J.A. 114). The City's discrimination in the case at bar exemplifies and derives from the historical status of retarded people in this country.

Public officials' reaction to retardation historically has been keyed to the principles of segregation and exclusion. This reaction, mirrored in this case by the City's effort to exclude the group home because its residents would be retarded, forms the basis for the trial court's determination that retarded people historically "have been isolated in remote, stigmatizing living arrangements." (J.A. 95, Trial Finding 32).

In 1887, California inaugurated the efforts to exclude retarded people from the normal life of the community by enacting legislation to establish institutions whose purpose was the segregation of "imbecile or feeble-minded" people. 1887 Cal. Stat. ch. 57 (repealed 1937). The segregative impulse became especially prevalent at the turn of the century when the official response to the needs of retarded people increasingly was simply to isolate them in large institutions (T. 142). The State of Texas first authorized the creation of an institution for

"the feeble minded of the state" in the Act of March 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143 (repealed 1955). Its segregative purpose was clear; it was to relieve society of "the heavy economic and moral losses arising from the existence at large of those unfortunate persons." *Id.*

Those retarded people not isolated from the community through institutionalization faced other forms of exclusion and segregation. Particularly destructive was their exclusion from one of the nation's primary creations for inculcating the knowledge to function in our society—the public school system. The Court already has noted this exclusion. In *Rowley, supra*, 458 U.S. 176, the Court first construed the principal federal statute aimed at remedying the historical exclusion—the Education for All Handicapped Children Act. Before the Act's passage "many of these children were excluded completely from any form of public education . . ." 458 U.S. at 191. A large percentage of the excluded children were retarded —and now are retarded adults.[14]

Another important manifestation of public efforts to isolate retarded people was the attempt to isolate them from supposedly having an impact on the composition of the next generation. For example, the previously discussed 1915 Texas statute for creation of a "State Colony for the Feeble Minded" had as another of its stated purposes the prevention of retarded people "from reproducing their kind." 1915 Tex. Gen. Laws 143, *supra*. *See generally*, P. Tyor and L. Bell, *Caring for the Retarded in America: A History* ch 4 & 5 (1984). During the

---

[14] The opinion in *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 293-97 (E.D.Pa. 1972), which was one of the major decisions providing an impetus for the new federal education legislation construed in *Rowley*, *see* 458 U.S. at 192-94, contains a telling chronicle of the prolonged mistreatment of the Nation's retarded citizens which reinforces Dr. Roos' trial testimony and the trial court's fact findings.

early years of the institutionalization movement, influenced by then-dominant eugenics theories, public officials employed two other methods to isolate retarded people from the next generation. Numerous states enacted legislation to deny retarded people the right to marry. *See generally*, Linn and Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 Gonzaga L. Rev. 625 (1978). Compulsory sterilization laws also became commonplace. In 1907, Indiana enacted "the world's first" sterilization law directed in part at what it termed institutionalized "idiots" and "imbeciles" —that is, people who are retarded. *See* O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20, 22 (1956). Eventually, thirty-two states passed such laws, all of which included within their target groups people who are retarded. *Id.* at 43. The eugenic basis for this legislation has since been discredited. *See, e.g.*, Sherlock and Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. Rev. 943, 954 (1982).

The misconceptions about retardation that led to such mistreatment still are prevalent (T. 167). The stigmatization that was the cause and the effect of the mistreatment and isolation of retarded people has been deep and thoroughgoing. It is exemplified by the phenomenon that, as the Fifth Circuit observed, "[o]nce-technical terms for various degrees of retardation—e.g. 'idiots,' 'imbeciles,' 'morons'—have become popular terms of derision." 726 F.2d at 197 (J.A. 125). Mental retardation is so stigmatizing that its label has been used to further stigmatize groups this Court already has found to be especially vulnerable to stereotypical views. There have been persistent efforts during America's history to establish links between retardation and race, national origin, immigrants, illegitimate children, and women. *See* R. Scheerenberger, *A History of Mental Retardation* 184-85

(1983). *See generally* S. Gould, *The Mismeasure of Man* (1981). These efforts betoken an additional reason for viewing discriminatory classifications based on retardation with suspicion.

The Court's analysis of whether heightened scrutiny is appropriate for intentional, invidious discriminations against retarded people also must take into account their exclusion from the political process. Their segregation in isolated institutions and exclusion from the educational process obviously would impair their ability to participate meaningfully in political decisions affecting them; however, the exclusion in this area has been even more direct and complete. The trial court found that retarded people "historically have been excluded from the political process . . ." (J.A. 95, Trial Finding 32). The Texas Constitution retains a prohibition against "idiots" voting. *See* Tex. Const. art. VI, § 1. In Texas, until the elections statute was amended in 1983, "idiots" were denied the right to vote. *See* Tex. Elec. Code Ann., art. 5.01, subdiv. 2 (Vernon 1967), *amended by* Tex. Elec. Code Ann., art. 5.01 subdiv. 2 (Vernon Supp. 1985). As recently as 1979, most states disqualified retarded people from voting. *See* Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. at 1644 (1979). In fact, as recently as 1982, it required a written opinion from the Texas Secretary of State, *see* Tex. Elec. Op. DAD-27 (1982), to establish the right to vote for a retarded person whom an election judge had deemed an "idiot" and consequently ineligible to vote.

The immutability of the distinguishing trait is another factor the Court evaluates in determining whether heightened judicial scrutiny is appropriate. *See, e.g., Parham v. Hughes, supra*, 441 U.S. at 351. Dr. Roos' testimony explained the immutability of retardation (T. 139). Retarded people are not responsible for the condition which elicits the discriminatory response. The innocent status of retardation, like the innocent status of being a school-

age child of an illegal immigrant, *see Plyler v. Doe*, 457 U.S. at 216-17 n.14, is beyond the control of the person to whom the status is assigned.

The immutability of retardation is one of several factors that makes retarded people a discrete "class" for purposes of equal protection analysis. It clearly distinguishes them from the vaguely defined class of children residing in school districts where wealth discrimination occurs that this Court in *Rodriguez* found to be "large, diverse, and amorphous," 411 U.S. at 28. The *Rodriguez* decision's disapproval of treating "amorphous" classes as discrete groups stems in large part from the fact that such classes do not possess immutable characteristics. The City ordinance itself treats retardation as a discernible, definable status. This treatment establishes people who are retarded as a discrete class. *See Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954) (demonstrated community attitudes may establish the separateness of a class). Whatever minor definitional modifications there might be at the margins of retardation and whatever degree of retardation a particular person possesses, the City's classificatory scheme treats them all the same: to live together in the community *all* retarded people must clear an extra hurdle, of uncertain but substantial (and possibly insurmountable) height, that almost no other group must confront.

That retarded people constitute a group uniquely situated to claim that official classifications disadvantaging them should be given stricter scrutiny than more typical classifications is borne out by the record and the briefs in this action. These sources demonstrate that false, unsupported stereotypes about retardation abound and that, due to deep-seated prejudices, retarded people still are a separate "caste"—an American equivalent of Indian "untouchables."

The five city officials most involved in the decisionmaking process leading to the exclusion of the CLC group

home were the only five city officials to testify at trial. Each was given an opportunity to testify about his knowledge of retardation, the most pertinent factor underlying their zoning ordinance and their decisions. None knew anything about it. Of the three city council members who voted against the special use permit: Councilmember Bass did not know and did not try to find out what retardation is (J.A. 24); Councilmember Johns, who served three years on the board of a local mental retardation center without once meeting a retarded person (J.A. 26-27), did not know what retardation means, but guessed it meant "mentally unbalanced or something of that nature." (J.A. 27); and Councilmember Martin could do no more than "guess it would be unstable." (J.A. 30). His guess was wrong, as Dr. Roos' testimony makes evident (J.A. 37-38). Given the councilmembers' testimony, their actions could have been based on nothing more than unexamined and false stereotyped views about retardation, reinforced by the unspecified, but effectively expressed fears of the neighbors.

The City's brief, too, is rife with stereotyped views of retarded people. For example, at one point it paints a scenario, irrelevant to the issues in this case, of what would happen if a retarded person were to live in a boardinghouse with persons who are not retarded. City's Br. 29-30. The City predictably concludes that only disaster, in several alternative forms, could result. The five alternative results posited by the City are not premised on any part of the record in this case or on citations to even one professional authority on retardation. Instead, like all the City's explanations, the results are premised on accepted but unexamined stereotypes of retarded people.

B. *Recent, Sporadic Public Policy Successes on Behalf of Mentally Retarded Persons Do Not Mean That Deep-Rooted, False Stereotypes Have Been Extirpated and That the Conditions Calling for Heightened Scrutiny Are Not Present*

Public policy initiatives at the national and state levels over the last decade[15] on behalf of handicapped people generally or retarded people in particular have not suddenly empowered retarded people. They still are subjected to pervasive discrimination and excluded from the community of citizens based on the false stereotypes that have taken root over the years.

This very case highlights how well-entrenched the stereotypes remain. The "fears" of the neighbors which, despite their vagueness, had a palpable impact on the city council, and the complete failure of city officials to know or even try to learn anything about retardation combined to exclude the group home and frustrate the state policy of integrating retarded people into the community. The only plausible basis for these exclusionary actions was the persistence of false stereotypes about retarded people. Cleburne is not just an isolated pocket of resistance. The resistance to group homes is widespread and sometimes takes violent form. *See, e.g., Society for Good Will to Retarded Children, Inc. v. Cuomo*, 572 F.Supp. 1300, 1340 (E.D.N.Y. 1983), *vacated*, 737 F.2d 1239 (2d Cir. 1984) (noting three instances of arson in Long Island due to community opposition to group homes). The attitudes displayed by Cleburne's resistance have been noted before by a federal court which, while grappling with issues concerning institutionalized retarded people, deplored the "unfortunate bias against the mentally retarded . . . un-

---

[15] *See, e.g.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*; Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*; Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann. art. 5547-300 (Vernon Supp. 1985).

derscored by recent attempts to exclude the retarded from residential areas through zoning mechanisms." *Garrity v. Gallen*, 522 F.Supp. 171, 195 n.92 (D.N.H. 1981).

Since the 1960's, public policy initiatives indicating heightened Congressional concern about the role of racial minorities and women in our society have proliferated. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Yet, no one has suggested that, as a result, the status of these groups in equal protection analysis has changed so that heightened scrutiny of laws discriminating against them is no longer appropriate. On the contrary, the continuing necessity for those laws demonstrates the seriousness of the problem. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), for example, the plurality opinion determined that civil rights statutes manifesting Congressional sensitivity to sex-based classifications were a significant factor militating in favor of applying heightened judicial scrutiny to such classifications.

The same is true regarding classifications based on retardation. In this term, the Court has noted the Congressional sensitivity to the "thoughtlessness and indifference" (and sometimes invidious discrimination) which has produced pervasive discrimination against handicapped citizens. *See Alexander v. Choate*, 105 S.Ct. —— (1985). The Court also noted that, in its antidiscrimination legislation, Congress has focused on the principle of meaningful access for handicapped people. *Id. See also Rowley, supra*, 458 U.S. 176 (the Court noting the Congressional focus on *access* in the Education for All Handicapped Children Act). The concerns displayed by Congress, far from supporting the argument that heightened judicial scrutiny is inappropriate and unnecessary in this case, add additional weight to the argument that it is needed here. The discrimination in this case parallels the type about which Congress has been most concerned. It is invidious and not just the result of thoughtlessness and indifference, although these elements, too, are present.

Additionally, the discrimination denied retarded people meaningful access to the community. It denied the group home's potential residents access in Cleburne to "the principal community living alternative[] for persons who are mentally retarded." (J.A. 94, Trial Finding 30). In this situation, the Congressional policies offer additional reasons for the Court to apply heightened judicial scrutiny to individious discriminations against retarded people, especially when as here the discriminations deny meaningful access to society's benefits—if not to society itself.

C. *Use of Heightened Judicial Scrutiny for Classifications Based on Mental Retardation Will Not Invalidate All Laws That Make Such Classifications*

A determination that mental retardation is a quasi-suspect classification will not place the Court in a constitutional straitjacket. All laws that classify based on retardation will not be invalidated automatically. There will not be, as the United States suggests, *see* U.S. Br. 7, a withdrawal from the democratic arena of all debate about retardation. Instead, the Court merely will have put public officials on notice that, in light of historical mistreatment of mentally retarded people and the pervasiveness of false stereotypes about them, distinctions disadvantaging them will receive a more searching judicial scrutiny than the relatively unintensive scrutiny given such quotidian distinctions as the one involving displaced hot dog vendors in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Notice of the heightened scrutiny should have the wholly beneficial effect of making public officials carefully examine or reexamine distinctions they have drawn based on long-prevailing stereotypes of retarded people. After the unthinking degradations that have been visited upon retarded people during this century alone, it is time for such reexamination.

The course of this Court's decisions in other areas where heightened scrutiny is applied makes it clear that a determination of quasi-suspectness in this case will not invalidate all distinctions. Gender classifications are subject to heightened scrutiny, *see Craig v. Boren*, 429 U.S. 190 (1976), but not every gender classification examined by this Court has been indiscriminately felled by the sharpened equal protection axe. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding statute requiring males but not females to register for the draft); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding statutory rape law making a gender classification). Indeed, in language applicable by analogy to claims that heightened scrutiny of classifications based on retardation would invalidate laws addressing the special needs of retarded people (including needs arising from past discriminatory treatment), the Court has stated that "a legislature may 'provide for the special problems of women.'" *Weinberger v. Wiesenfeld, supra*, 420 U.S. at 653.

Classifications based on legitimacy, too, are subject to heightened scrutiny, *see, e.g., Mills v. Habluetzel*, 456 U.S. 91 (1982); *Trimble v. Gordon*, 430 U.S. 762 (1977), but invalidation of laws making those classifications is not inevitable. *See, e.g., Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding requirement that illegitimate children meet a more onerous burden of proving paternity for intestate succession from their fathers); *Mathews v. Lucas*, 427 U.S. 495 (1976) (upholding Social Security Act provision disadvantaging illegitimate children). Subjecting alienage distinctions to heightened scrutiny likewise has not resulted in the invalidation of all laws drawing those distinctions. *Compare Bernal v. Fainter*, 104 S.Ct. 2312 (1984), *with Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Even when distinctions are drawn on the basis of race, the paradigm of a suspect classification, constitutional invalidation has not invariably followed. *See Tancil v. Woolls*, 379 U.S. 19 (1964); *see also Fullilove v.*

Klutznick, 448 U.S. 448 (1980). There is no reason to expect the Court to be less discerning in applying heightened scrutiny to classifications based on retardation.

Running as an undercurrent to the arguments that the Court should ignore all the standards it has elucidated over the years and apply only minimal scrutiny to classifications based on retardation is the implication that a virtual avalanche of laws making such classifications will fall if heightened scrutiny is applied. Yet, only one law (which does not classify based on retardation) is cited as being possibly thought to be endangered. *See* U.S. Br. 21 n.7. It is part of a comprehensively administered social welfare program. *Dandridge v. Williams*, 397 U.S. 471 (1970), requires that social welfare legislation making allocational decisions receive highly deferential review. The paucity—if not outright absence—of examples of statutes making classifications based on retardation suggests that no avalanche need be anticipated.

For several reasons, the Court is unlikely to be deluged with retarded claimants asking it to invoke the heightened scrutiny appropriate when public officials intentionally discriminate on the basis of mental retardation. First, in the realm of allocation of public benefits, there will rarely be a case where intentional discrimination based on mental retardation can be established. It is for this reason that the fears expressed in the dissent from denial of rehearing below concerning, for example, comparisons of funding levels for facilities for retarded persons and hospitals for the public (J.A. 142) are misplaced. In any event, the concept of meaningful access at the core of this case is a sufficient distinguishing factor from entitlement to a specific share once access is attained. Second, in many areas involving personal rights, the heightened scrutiny accompanying a determination that mental retardation is a quasi-suspect classification will be submerged by the even more intensive scrutiny re-

quired for the denial of those fundamental rights. If distinctions are drawn based on retardation in statutes determining who may vote or through official determinations of who may marry or who may be involuntarily sterilized, the Court already strictly scrutinizes them. *See, e.g., Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (franchise); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (sterilization).

This case presents none of the difficulties just discussed. It involves the relatively straightforward claim that the Equal Protection Clause requires cities to allow retarded people to have access to the community on an equal footing with all other similarly situated people. The record reflects, and the City has conjured up nothing to refute it, that being retarded does not make one somehow less qualified to live in the community. To accept the argument that retardation alone disqualifies one from living normally amongst the community of citizens would run contrary not only to the fundamental principle of the Equal Protection Clause but also to legislative trends and professional understandings. The nearly inevitable result of such a determination would be the reinstitutionalization of America's retarded people and increased efforts to isolate them from society. The false stereotypes will have become the excuse for efforts to insure that some day they not be false. Nothing in the Constitution generally or in the Equal Protection Clause specifically allows a community to exclude from its midst (and from an opportunity to live a meaningful, productive life) a group of people it deems less than equal merely because they are not as smart as most people.

III. Neither the Zoning Ordinance on Its Face nor the Special Use Permit Denial Can Survive the Scrutiny Required When a Quasi-Suspect Classification Has Been Made

A governmental classification based on a quasi-suspect class must be substantially related to an important governmental interest. *See e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976). This standard for scrutinizing legislative classifications under the Equal Protection Clause is a more exacting one than the rational basis standard whose basic formulation often has been stated by the Court, *United States Department of Agriculture v. Moreno*, *supra*, 413 U.S. at 533 ("rationally related to a legitimate governmental interest"). Because the City has intentionally discriminated against mentally retarded people and because mentally retarded people constitute a quasi-suspect class, *see* Part II, *supra*,[16] the Court must scrutinize the City's discriminatory zoning actions to determine whether their bases were substantially related to important governmental interests.[17]

---

[16] The history of purposeful, unequal treatment recounted there suggests that retarded people meet the criteria for treatment as a suspect class; however, the City's actions fall under whatever degree of scrutiny is applied, and, therefore, the Court need not determine that question.

[17] Even if retardation, standing alone, is determined not to be a quasi-suspect classification, another consideration still makes heightened scrutiny appropriate in this case. The trial court's twin fact findings that group homes are the *principal* community living alternatives for retarded people and are an *essential* ingredient of normal living patterns for them (J.A. 94, Trial Finding 30) means that the City's prohibition of the operation of the CLC group home—which was to have been the first one ever in the City—effectively denied the group home's potential residents of the only community shelter meaningfully available to them. While shelter is not a fundamental constitutional right, *Lindsey v. Normet*, *supra*, 405 U.S. at 74, it clearly is among the more important societal benefits. This case, therefore, presents the Court with a confluence analogous to the one presented in *Plyler v. Doe*, 457 U.S. 202 (1982): persons not

The City's articulated objectives and its explanations of the relation of its discriminatory actions to those objectives already have been canvassed in great detail in the portion of this brief discussing the rational basis standard of equal protection analysis. *See* Part I, *supra.* Because the City's actions cannot survive even the rational basis standard of review, it perforce follows that they cannot survive the more intensive scrutiny required in this case.

The City, as the party seeking to uphold a quasi-suspect classification, has the burden of showing an "exceedingly persuasive justification" for its discriminatory acts. *See Mississippi University for Women v. Hogan,* 458 U.S. at 724; *see also Wengler v. Druggists Mutual Insurance Co.,* 446 U.S. 142, 151 (1980). As the extended analysis in Parts I.A and I.B, *supra,* establishes, the City's justifications for its discriminatory ordinance and its discriminatory denial of the special permit fall far short of being exceedingly persuasive.

Instead, the primary purpose posited by the City for its zoning ordinance's invidiously distinctive treatment of retarded people—protection of the neighbors' interests—itself was based on false stereotypes and unsupported notions of what retardation is. In another context, the Court already has indicated its disapproval of such falsely-based objectives. *See Hogan,* 458 U.S. at 725 ("[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions").

The councilmembers' decision to deny the special use permit, primarily motivated by a factor about which they

---

responsible for their status and historically subject to discrimination are seeking minimal access to basic societal benefits. At such confluences, constitutional protections broaden somewhat beyond their normal bounds and the intermediate tier of equal protection scrutiny is applicable.

admittedly knew nothing, likewise cannot withstand the more intensive scrutiny the Court applies to quasi-suspect classifications. Their "mechanical application of traditional, . . . inaccurate[] notions" about retardation rather than a "reasoned analysis" of what it entails is constitutionally insufficient. *See Hogan*, 458 U.S. at 725-26.

The City's *post hoc* rationalizations for its exclusionary zoning actions do not meet the *Craig v. Boren* equal protection standard. They reflect that its actions were predicated on an entrenched prejudice incompatible with the constitutional understanding that each person—including those who are retarded—is to be judged individually and is entitled to equal justice under law. *See Plyler v. Doe, supra*, 457 U.S. at 216-17 n.14. The City denied persons who are mentally retarded the equal protection of its laws.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed, and the case should be remanded to that court with instructions to remand it to the district court for further proceedings on the issue of damages consistent with the Court's opinion.

Respectfully submitted,

RENEA HICKS
Counsel of Record

DIANE SHISK
ADVOCACY, INC.
7700 Chevy Chase Drive
Suite 300
Austin, Texas 78752
(512) 475-5543
Attorneys for Respondents

Of Counsel:

ARLENE KANTER
CARYL OBERMAN

February, 1985

(11)

No. 84-468

Office-Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT, JOINED BY THE STATES OF ARKANSAS, CALIFORNIA, COLORADO, ILLINOIS, LOUISIANA, NORTH DAKOTA, RHODE ISLAND, TENNESSEE and WEST VIRGINIA IN SUPPORT OF THE RESPONDENTS

JOSEPH I. LIEBERMAN
Attorney General of the
State of Connecticut
Amicus Curiae

ELLIOT F. GERSON
Deputy Attorney General

HENRY S. COHN
Assistant Attorney General
Counsel of Record
30 Trinity Street
Hartford, Connecticut 06106
(203) 566-4990

(Additional List of Counsel on Inside Pages)

LAWRENCE W. BERLINER
Of Counsel
Connecticut Office of Protection and Advocacy for Handicapped and Developmentally Disabled Persons

JOHN STEVEN CLARK
Attorney General of the
State of Arkansas
Amicus Curiae

JOHN K. VAN DE KAMP
Attorney General of the
State of California
Amicus Curiae

DUANE WOODARD
Attorney General of the
State of Colorado
Amicus Curiae

NEIL F. HARTIGAN
Attorney General of the
State of Illinois
JILL WINE-BANKS
Solicitor General
ROBERT J. CONNOR
Special Assistant Attorney General
Illinois Department of Mental Health and Developmental Disabilities
Amicus Curiae

WILLIAM J. GUSTE, JR.
Attorney General of the
State of Louisiana
ROBERT A. BARNETT
Assistant Attorney General
Amicus Curiae

NICHOLAS J. SPAETH
Attorney General of the
State of North Dakota
Amicus Curiae

ARLENE VIOLET
Attorney General of the
State of Rhode Island
Amicus Curiae

W. J. MICHAEL CODY
Attorney General of the
State of Tennessee
Amicus Curiae

CHARLES G. BROWN
Attorney General of the
State of West Virginia
Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI.....	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
I. The Zoning Ordinance Violates the Equal Protection Clause When Measured By The Appriate Heightened Standard of Scrutiny.....	7
A. The Intermediate Standard.....	8
B. The Mentally Retarded May Be Viewed As a Quasi-suspect Class, Especially When Exclusionary Zoning Ordinances Are at Issue.....	14
C. The Zoning Ordinance Discriminates, Using the "Heightened" Standard of Review...	30
II. The Zoning Ordinance is Invalid Even Under the More Deferential Level of Scrutiny.....	34
CONCLUSION.....	39

TABLE OF AUTHORITIES

CASES — Page

Ass'n for Retarded Citizens v. Olson, 561 F.Supp. 473 (D.N.D. 1982) 17

Buck v. Bell, 274 U.S. 200 (1927) 15

Capital Cities Cable, Inc. v. Crisp, ____ U.S. ____, 104 S.Ct. 2694, 2699 (1984) 38

Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984) 14, 19, 25, 26, 31, 33

Cleburne Living Center, Inc. v. City of Cleburne, 735 F.2d (5th Cir. 1984) 20, 21

Craig v. Boren, 429 U.S. 190 (1976) 12

F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 35

Fialkowski v. Shapp, 405 F.Supp. 946 (E.D. Pa. 1975) 17, 18

Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980) 15, 38

Frontiero v. Richardson, 411 U.S. 677 (1973) 12, 18, 24

Page

Hunter v. Erickson, 393 U.S. 385 (1969)..... 33

J. W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983).... 19

Kirchberg v. Feenstra, 450 U.S. 455 (1981)..... 12

Lalli v. Lalli, 439 U.S. 259 (1978).....13, 14

Levy v. Louisiana, 391 U.S. 68 (1968)..... 13

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....34, 35

Loving v. Virginia, 388 U.S. 1 (1967)..... 8

Macon Ass'n for Retarded Citizens v. Macon Bibb County Planning & Zoning Com., 252 Ga. 484, 314 S.E.2d 218 (1984)..... 37

McGinnis v. Royster, 410 U.S. 263 (1973)..... 35

Mathews v. Lucas, 427 U.S. 495 (1976)..... 13

Mills v. Habluetzel, 456 U.S. 91 (1982)..... 13

Page

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)..... 20

Moore v. City of East Cleveland, 431 U.S. 494 (1977)..... 33

Oliver v. Zoning Commission of the Town of Chester, 31 Conn. Supp. 197, 326 A.2d 841 (Middlesex County, Court of Com. Pl. 1974)..... 3

Palmori v. Sidoti, ____U.S.____, 104 S.Ct. 1879 (1984)..... 18

Plyler v. Doe, 457 U.S. 202 (1982).....5, 8, 10, 11, 19, 34

Reed v. Reed, 404 U.S. 71 (1971)..... 12

Regents of University of California v. Bakke, 438 U.S. 265 (1978)..... 8, 21

Romeo v. Youngberg, 644 F.2d 147 (3rd Cir. 1980)..... 17

San Antonio Ind. School Dist. v. Rodriquez, 411 U.S. 1 (1973).....9, 16, 18

Page

Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984). 29

Trimble v. Gordon, 430 U.S. 762 (1977)..... 13

United States v. Carolene Products, Inc., 304 U.S. 144 (1938)..... 9

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)..... 37

Washington v. Davis, 426 U.S. 229 (1976)..... 24

Weber v. Aetna Casualty & Surety Co., 406 U.S. 169 (1972)..... 9

Youngberg v. Romeo, 457 U.S. 307 (1982).....17, 22, 23

CONSTITUTION

U.S. Const. Amendment XIV, Sec. 1.....Passim

STATUTES

Federal

29 U.S.C. § 794..... 21

State

Cal. Health & Saf. Code §§ 1566 et seq. 3

Conn. Gen. Stat. § 8-3e..... 3

N.D. C.C. § 25-16-14(2)..... 4

R. I. Gen. Laws Tit. 45, Chap. 24, § 22..... 4

OTHER AUTHORITIES — Page

Halpern, "Introduction", 31 Stan. L. Rev. 545 (1979).. 16

McQuillin, The Law of Municipal Corporations (1983).....37, 38

O'Connor, Home is a good place (1976).....26, 27

Tribe, American Constitutional Law (1978)..... 10

Tyor & Bell, Caring for the Retarded in America (1984)... 16

"Can the Mentally Retarded Enjoy 'Yards that are Wide,'" 28 Wayne L.R. 1349 (1982)..... 4

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-468

City of Cleburne, Texas, et al.,
Petitioners,

V.

Cleburne Living Center, Inc., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT, JOINED BY THE STATES OF ARKANSAS, CALIFORNIA, COLORADO, ILLINOIS, LOUISIANA, NORTH DAKOTA, RHODE ISLAND, TENNESSEE, and WEST VIRGINIA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

Amici States, pursuant to Supreme Court Rule 36, write to emphasize

their concern that mentally retarded persons not be invidiously and arbitrarily excluded from community residence by discriminatory zoning policy. Mentally retarded people have frequently been subject to brutal degradation. Unfortunately, state agencies have been part of this degradation in two interrelated ways: by adopting official policies excluding mentally retarded people from community life (keeping retarded children out of public schools and retarded adults out of residential neigborhoods); and by maintaining large, geographically remote state institutions as the exclusive residence for all such people. In many of these remote institutions, lifelong custodial confinement was sometimes the best that retarded people could hope for.

In recent years American society generally has acknowledged that historic injustices were inflicted on mentally retarded people. Most states have committed themselves to reform. Ending the total exclusion of retarded people from ordinary community life is an essential step in that remedial process. To this end, states have adopted legislation prohibiting zoning that excludes group homes for the mentally retarded. 1/

1/ Thirty-one States presently have statutes barring exclusionary zoning. See e.g.; Cal. Health & Saf. Code §§ 1566 et seq.; Conn. Gen. Stat. § 8-3e; Oliver v. Zoning Commission of the Town of Chester, 31 Conn. Supp. 197, 201, 326 A.2d 841, 843 (Middlesex County, Court of Com. Pl., 1974) ("issue presented is of immediate and great importance to the State....The expanding program of rehabilitating our mentally retarded through community residence may face similar zoning hurdles in other areas");

Footnote 1 continued on next page.

But the prohibition of such zoning should not rest on legislative discretion. Accordingly Amici States contend that exclusionary zoning which is directed against mentally retarded people as such should be prohibited as a matter of constitutional principle.

The effect of such a decision would be to strengthen the efforts of the Amici to insure proper treatment of a severly disadvantaged class in our society. If the Court of Appeals is affirmed, the States will have the latitude they need to place mentally retarded individuals in whatever

---

Footnote 1 continued:

N.D.C.C. § 25-16-14(2); R.I. Gen. Laws Tit. 45, chap. 24 § 22.

See also comment, "Can the Mentally Retarded Enjoy 'yards that are wide,'" 28 Wayne L.R. 1349 (1982).

residential settings that are necessary for their greatest development and integration into society.

SUMMARY OF ARGUMENT

This Court has developed a continuum of standards of review of challenged legislative classifications under the Equal Protection Clause. For minority groups that have been traditionally discriminated against, that lack political influence, and that face "recurring constitutional difficulties." Plyler v. Doe, 457 U.S. 202, 217 (1982), this Court has applied a "heightened" standard which is less demanding than the most rigid review, but requires a showing that a classification is substantially related to the achievement of an important purpose.

Mentally retarded individuals should be considered a quasi-suspect class. They have been subjected to historical prejudice and political exclusions because of a condition that is immutable. Exclusionary zoning practices affect the mentally retarded with special severity. Mentally retarded citizens occupying a group home are similarly situated to the non-retarded living in group arrangements. No principled distinction may be made between one group or the other.

Under the heightened scrutiny standard, petitioner cannot justify its zoning ordinance on any ground, either on its face or as applied by the city council.

But, even assuming a "rational basis" review to be applicable here, the

ordinance fails. There has been no valid, "articulated" legislative purpose for the exclusion, only post hoc justification.

I.

THE ZONING ORDINANCE VIOLATES THE EQUAL PROTECTION CLAUSE WHEN MEASURED BY THE APPROPRIATE HEIGHTENED STANDARD OF SCRUTINY.

Amici contend that the zoning ordinance of petitioner violates the rights of mentally retarded citizens, when measured under a "heightened" or "extremely sensitive" standard of review. We first discuss this "intermediate" standard, then find the mentally retarded properly eligible for this classification, and finally demonstrate the unconstitutionality of the challenged ordinance.

A. The Intermediate Standard

The Equal Protection Clause does not call for the application of a "rational basis" test in all instances. [2/] A continuum of standards for review exists. The strictest scrutiny is applied to "suspect classes." Plyler v. Doe, 457 U.S. 202, 216 (1982). The prime example of a suspect class is one based upon race. See Loving v. Virginia, 388 U.S.1 (1967) (anti-inter-racial marriage statute subjected to the "most rigid scrutiny.") However, as the determining opinion observed in Regents of University of California v. Bakke, 438 U.S. 265, 290 (1978), new types of classifications may be added to the

---

2/ We discuss the invalidity of the present ordinance even under this "more deferential" standard infra, at 34.

"list of 'suspect' categories." Justice Powell, writing in San Antonio Ind. School Dist. v. Rodriquez, 411 U.S. 1, 28 (1973), set forth the well-recognized requisites for finding a "suspect class". This class is one "[s]addled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." See also United States v. Carolene Products, Inc., 304 U.S. 144, 152-53, n.4 (1938) (prejudice against "discrete and insular minorities may be a special condition" calling for severe scrutiny); Weber v. Aetna Casualty & Surety Co., 406 U.S. 169 (1972) (illegitimacy as an unalterable, stigmatizing trait).

In Plyler v. Doe, supra, at n.14, this Court concluded:

> The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.

Id., at 217.

In addition, certain groups "bear enough resemblance to such minorities [described above] to warrant more than casual judicial response when they are injured by law." Tribe, American Constitutional Law at 1C90. This "intermediate" scrutiny test was described in Plyler as follows:

> [W]e have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.

457 U.S. at 217.

In Plyler, this standard was applied to strike down statutes barring free public education for children of illegal aliens, whom the opinion termed "special members of [an] underclass." As Justice Powell stated in his concurrence:

> [These children] are excluded [from public school] only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in our country unlawfully. The

> respondent children are innocent in this respect.... Our review in a case such as this is properly heightened.

Id., at 238.

This test is also appropriate to evaluate classifications based upon gender. See Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Kirchberg v. Feenstra, 450 U.S. 455 (1981). In his concurring opinion in Craig v. Boren, 429 U.S. 190, 210 n* (1976), Justice Powell recognizes "that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." The Court in Craig demanded that the gender-based distinction be "substantially related" to achievement of its object. Id., at 197. (Emphasis added).

A similar level of review has been applied to legislation involving illegitimate children. Levy v. Louisiana, 391 U.S. 68 (1968) ("extremely sensitive" when evaluating state statute); Mathews v. Lucas, 427 U.S. 495 (1976) (scrutiny is "not a toothless one"); Trimble v. Gordon, 430 U.S. 762 (1977); Mills v. Habluetzel, 456 U.S. 91, 97 (1982) ("restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest."). While upholding a New York law requiring specific proof of paternity before an illegitimate child can inherit from his father, the Court declared that "[a]lthough...classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the

Fourteenth Amendment if they are not substantially related to a permissible state interest." Lalli v. Lalli, 439 U.S. 259, 265 (1978).

Amici submit that it is this intermediate standard that should control in the present case.

B. The Mentally Retarded may be viewed as a quasi-suspect class, especially when exclusionary zoning ordinances are at issue.

The Court of Appeals in this case correctly designates three factors which indicate that mentally retarded people are in a quasi-suspect class -- historical prejudice, political powerlessness, and the immutability of the trait for which they have been penalized. 726 F.2d at 198.

Turning to the history of the treatment of retarded, it has been found as a fact by the trial court that "[p]ersons who are mentally retarded

historically have been subjected to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements." (District Court Finding #32). The traditional attitude affected this Court in Buck v. Bell, 274 U.S. 200 (1927), relying on the views of the Eugenic Society to approve sterilization of a mentally retarded person. 3/

3/ Also with regard to the treatment of retarded persons, cf. Fowler v. United States, 633 F.2d 1258, 1260 (8th Cir. 1980):

> Until the early 1960's, federal employment opportunities for the mentally retarded were extremely limited, owing, as noted in the government's brief, to 'factors such as examinations required for positions in the Competitive Service, lack of understanding of the retarded person's ability to perform in a competitive work setting, and prejudice.'

Footnote 3 continued on next page.

One of the consequences of the isolation of the retarded is their residual political powerlessness, which has led some courts to regard them as a "discrete and insular" minority. As the

---

Footnote 3 continued:

A recent study concludes:

> The history of the mentally retarded in America is a story of a hidden community, a group of persons, mostly children, traditionally viewed with pity, scorn, and contempt, who have been organized and contained on the periphery of society. They have represented an underclass of forgotten people.

Tyor & Bell, Caring for the Retarded in America (1984) at ix. See also Halpern, "Introduction", 31 Stan. L. Rev. 545 (1979).

Contrary to the contentions of the Solicitor General at page 7 of his brief Rodriquez emphasizes the history of treatment of the group, not its present status, in determining "suspectness."

court observed in Romeo v. Youngberg, 644 F.2d 147, 163, n. 35 (3d Cir. 1980), vacated on other grounds, 457 U.S. 307 (1982): "The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude.... The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process." See also Ass'n for Retarded Citizens v. Olson, 561 F.Supp. 473 (D.N.D. 1982) (intermediate scrutiny appropriate in light of lingering discrimination); Fialkowski v. Shapp, 405 F.Supp. 946, 958, 959 (E.D.Pa. 1975) (finding a suspect class warranting "greater judicial scrutiny than that applied in

Rodriquez."). 4/

The evidence in this case clearly demonstrates that the mentally retarded's condition is "not a curable condition." 726 F.2d at 198. As Respondent's expert testified:

4/ That some remedial legislation has been adopted ameliorating the condition of the retarded, or that a few advocacy groups have aggressively protected the rights of the retarded, does not establish that the retarded are not politically powerless, as petitioners urge. Certainly Congress' passage of Title VII did not give this Court pause when it established the standard for review for legislation resting on gender discrimination. See Frontiero, 411 U.S. at 686. Nor has legislation favoring blacks, e.g., the 1964, 1965, or 1968 Civil Rights Acts, led this Court to withhold strict scrutiny review of state legislation concerning this group. Palmori v. Sidoti, ____U.S.____, 104 S.Ct. 1879 (1984).

> Mental retardation is a problem of a deficit in intellectual development and social adaptation. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally, it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.

J.A. at 38. 5/

5/ Amici emphasize that the mentally ill are different in this regard from the retarded, although one court has used the Plyler rationale to find the denial of a zoning permit for a mentally ill group home unconstitutional. See J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983). Accordingly, this Court need not address itself to the proper standards of review for zoning exclusions based on mental illness alone.

This Court should also note a typographical error in the opinion of the 5th Circuit. In note 11 one sentence should read: "Mental retardation is not an emotional disorder but a learning problem; it arguably invokes fewer safety concerns than does mental illness."

The mentally retarded are thus subject to the same "stereotyping" condemned by this court in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (man excluded from women's nursing school), and the same equal protection test should apply here -- a showing that the legislation is substantially related to achievement of the sought-after objective.

While exclusionary zoning laws must be invalidated on the basis of this test, it would not nullify other state policies appropriately differentiating retarded from non-retarded people. Indeed we agree with the judges dissenting from the denial of hearing en banc, 735 F.2d 832, 834, that there are "myriad of areas in which governmental practices may distinguish the retarded

and the non-retarded." [6/] Differentiation of retarded people for purposes of providing special, beneficial educational programs are surely justifiable. See Bakke, supra.

6/ This principle is further found in 29 U.S.C. § 794:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. (Emphasis added).

Similarly, provision of special institutional residences for retarded people can be justified where there is a demonstrated professional basis for concluding that such residence is not harmful and can be beneficial. The constitutional due process guarantee requires this conclusion, as this Court has held in Youngberg v. Romeo, supra; [7/] and the same conclusion

---

7/ Contrary to the argument in the amicus brief submitted by the State of Pennsylvania, this Court did not decide, even implicitly, in Romeo that state laws imposing restrictions on retarded people would be subjected only to "minimal scrutiny." This Court held in Romeo that states were not free merely to provide custodial confinement -- that is, only "food, shelter, clothing and medical care." 457 U.S. at 315. The Court held that states were also constitutionally required to provide "some minimally adequate or reasonable training" for the benefit of institutionalized retarded people. Id., at 319. The Court was concerned that this constitutional mandate should not

Footnote 6 continued on next page.

follows from the equal protection analysis recognizing retardation as a quasi-suspect classification. This recognition would not, moreover, invalidate exclusion of retarded people from state universities or civil service merit employment, because it is not

---

Footnote 6 continued

"restrict unnecessarily the exercise of professional judgment" through judicial prescription of the precise content of such required training programs, and it accordingly "emphasize[d] that courts must show deference to [professional] judgment." Id., at 322. If, however, the Court in Romeo had been applying the analytic equivalent of "minimal scrutiny" to the state's policy, it would have accepted Pennsylvania's basic argument that no special training programs whatsoever were constitutionally required. The Court rejected this argument and thereby imposed a higher standard than "minimal scrutiny" to protect the interests of retarded people against state actions.

directed against retarded people as such but applies to all people measured on the basis of general achievement or intelligence. Such exclusions, therefore, are not based on invidious stereotyping aimed at a historically vulnerable group as such. The fact that retarded people are excluded is merely an incidental or unintended aspect of the application of a generally neutral state policy. See Washington v. Davis, 426 U.S. 229 (1976). 8/

On the other hand, zoning regulations explicity excluding retarded people are a purposeful, invidious state

---

8/ For this same reason, as Justice Brennan suggested in dicta in Frontiero, state classifications based generally on "intelligence" are not suspect since they are not directed at a vulnerable stereotyped group as such.

discrimination and cannot be constitutionally justified. As Judge Goldberg aptly stated in describing the fundamental issue of living conditions for the retarded:

> We note that heightened scrutiny is particularly appropriate in the case at bar, because the Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded....[T]he exclusion of group homes from Cleburne operates to prevent mentally retarded persons from assimilating into and contributing to their society. The trial court found that [g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes

> harder to establish operates to exclude persons who are mentally retarded from the community. Cleburne, supra, at 9, Finding 30. Isolated from normal community patterns, they can never hope to adapt. The resulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

Id., at 199.

Petitioners' claim at 29-32 of their brief that the retarded in group homes cannot hold employment, care for themselves, conform to societal standards or cope with emergencies is contrary to the evidence developed at the District Court, [9/] and evidence

---

9/ Experience has shown that these allegations are unfounded. See O'Connor, Home is a Good Place: A national perspective of community residential facilities for

Footnote 9 continued on next page.

Footnote 9 continued.

developmentally disabled persons (1976) at 24:

> One-third of the CRFs studied were reported to have faced oppostion by members of the community at the time of their establishment. Most of the opposition was mounted by neighbors (83%). Occasionally, businessmen, city or county officials, or other community leaders (11%) created opposition without concurrent opposition by neighbors. Respondents also reported that the situation had changed since the establishment of the facility; almost all (89%) reported that the opposition had definitely decreased. The reasons for this decrease in opposition were reported to be primarily the behavior of the residents in the community and/or the efforts of the facility managers (81% and 48% respectively with a 39% overlap of the two reasons).

in and of itself of the archaic view of mental retardation. The only evidence of improper behavior adduced at trial was an incident from a Keene, Texas, group home where mail was taken briefly from a mailbox by a resident and later returned. J. A. at 36.

The District Court found that the residents of the group home in Cleburne would be self-sufficient with staff assistance and hold employment in the community. J.A. 93. Respondents' expert, referring to the retarded in general, testified that "[m]ost of these people live in communities with the rest of us, and in point of fact, most become invisible after they leave school." J. A. at 39. Thus the mentally retarded in the group home setting have not been

shown to differ from non-retarded in similar housing conditions. 10/ That is one reason why zoning discrimination is especially proper for "heightened" scrutiny.

The State may not be required to take positive steps to insure that all mentally retarded people will live in the community. See Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1249 (2d Cir. 1984) (there is "no constitutional right to community placement.") But this does not mean that the State is constitutionally permitted to prohibit all retarded people from residence in the community.

10/ The retarded certainly do not differ from non-retarded who are handicapped because of automobile accidents or other catastrophic events. Such non-retarded, handicapped people require assistance in almost every aspect of daily living.

C. The Zoning Ordinance Discriminates, using the "heightened" standard of review.

The Cleburne zoning ordinance allows a district zoned R-3 to contain multiple dwellings, boarding houses, fraternity and sorority houses, nursing homes, and private clubs. Hospitals for "the insane or feeble minded, or alcoholic or drug addicts, or penal or correctional institutions" are permitted only upon issuance of a special permit by the City Council. The permit is effective for one year.

The District Court here found that "[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use

would be permitted under the city's zoning ordinance." Finding 24. In its opinion the District Court further concluded that "[t]here can be little doubt that Cleburne's zoning ordinance selectively discriminates against the... 'feeble minded'." 11/

We agree with the Fifth Circuit that each of the justifications advanced for this discrimination by petitioners fails to demonstrate "a sufficiently close correspondence between the goal and the ordinance's means of achieving it." 726 F.2d 200, 201. The Fifth Circuit correctly rejects the city's claims of population concentration and

---

11/ The District Court sanctioned this discrimination under the "rational basis" standard of the Equal Protection Clause. Amici believe that this discrimination cannot be justified under any standard.

traffic congestion. How the serenity of the neighborhood would be furthered by the ordinance when fraternity and sorority houses and homes for delinquent children may be established in the zone is unexplained. Nor, we venture, could it be rationally explained. Furthermore, concerns of safety and health may be protected by the "extensive regulations and guidelines" established by state and federal law, see Finding 20, District Court, rather than by the over-inclusive ordinance here.

The one-year limit on the special use permit is also discriminatory and prejudicial. Development of group homes, as in this case, are often undertaken through the private market. There is a powerful disincentive to investment where permits must be renewed annually. This zoning law will,

therefore, almost surely bar any access to the community by the mentally retarded. As such, it is identical to the ordinance struck down in Hunter v. Erickson, 393 U.S. 385 (1969), which gave a veto to the citizenry regarding open housing, and thereby discriminated against racial minorities. Like the zoning ordinance in Moore v. City of East Cleveland, 431 U.S. 494 (1977), the ordinance here is a "senseless and arbitrary restriction" on a protected class. (Brennan, J., at 506). 12/

12/ Amici concur with the 5th Circuit's "as applied" analysis, 726 F.2d at 202. The reasons for the city council's decision turning down the special permit were speculative and unsupported. The fact that thirty mentally retarded students attend a public school located across the street diminishes any claim that thirteen retarded adults need to be protected from students at the school. The home is projected for thirteen residents, not the usual six. In any event, the Respondent Association is taking steps to make sure space is adequate.

II.

THE ZONING ORDINANCE IS INVALID EVEN UNDER THE MORE DEFERENTIAL LEVEL OF SCRUTINY.

Without a "suspect class", the standards of review under the Equal Protection Clause recognize "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." Plyler, supra, at 216.

This discretion is not without limits, however. The standard is not difficult to meet when the governmental body acts in good faith and sensibly. Yet, it is not a "toothless" test. Logan v. Zimmerman Brush Co., 455 U.S.

422, 438 (1982) (Justice Blackmun's separate opinion). The "challenged distinction" must rationally further "some legitimate, articulated state purpose." McGinnis v. Royster, 410 U.S. 263, 270 (1973). See also F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920): "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Petitioner claims to be regulating a business venture under its zoning code. But it is only necessary to compare the permitted uses with the non-permitted uses to see the plain irrationality of the ordinance. Public and private schools and colleges, along

with their dormitories, fraternity and sorority houses and sport stadiums are permitted. Private clubs and fraternal orders are permitted, without any restrictions on liquor consumption. Tenements, row houses, and apartment houses and hotels without limits on the number of families living in them are permitted as are boarding and lodging houses. Philanthropic homes for people such as unwed mothers or delinquent youth or paroled felons are permitted. Hospitals for the aged are permitted, and without limitation on number. On the other hand, thirteen mentally retarded citizens may not establish residence in this zone. No purpose at all has been stated for such discriminatory treatment of a class; nor could one be that is not based on invidious grounds.

Normally, zoning ordinances would receive deferential treatment. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Macon Ass'n for Retarded Citizens v. Macon Bibb County Planning and Zoning Commission, 252 Ga. 484, 314 S.E.2d 218 (1984), appeal dismissed, 105 S.Ct. 57 (1984). In Macon, all multi-family living arrangements were excluded from the zone, not merely mentally retarded people. In this case, however, the city zoning ordinance authority excludes group homes, but not other similar uses. This process is not a unitary one where all similar groups are subjected to the same treatment. See McQuillin, The Law of Municipal Corporations, § 25.123: "The classification cannot prohibit or restrict certain uses

and permit other uses where there is no valid basis, reasonably related to the public health, safety, morals, welfare or other proper object of the police power, for distinguishing between them."

The petitioner here has not satisfied even the minimum standard under the Equal Protection Clause. The ordinance should be declared void. 13/ See Fowler v. United States, 633 F.2d (8th Cir. 1980) holding that a mentally retarded worker was discriminated against in his firing under a "rational basis" standard of equal protection.

13/ This Court need not remand to the Court of Appeals, as the Solicitor General suggests, to find the ordinance invalid. On this record, this Court clearly may do so now. Capital Cities Cable, Inc. v. Crisp, ____U.S.____, 104 S.Ct. 2694, 2699 (1984).

CONCLUSION

For the above-stated reasons, the judgment of the Fifth Circuit declaring the zoning ordinance unconstitutional should be affirmed.

RESPECTFULLY SUBMITTED,

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL of the
State of Connecticut
Amicus Curiae

ELLIOT F. GERSON
Deputy Attorney General

HENRY S. COHN
Assistant Attorney
General
Counsel of Record
30 Trinity Street
Hartford, Connecticut
06106
Tel: (203) 566-4990

(Additional List of Counsel On Inside Pages)

MOTION FILED
FEB 2 1985

No. 84-468

In the

Supreme Court of the United States

October Term, 1984

City of Cleburne, Texas, et al.,
Petitioners,

-v.-

Cleburne Living Center, Inc., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS INC., NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED, INC., NATIONAL REHABILITATION ASSOCIATION, INTERNATIONAL LEAGUE OF SOCIETIES FOR PERSONS WITH MENTAL HANDICAP, AND TEXAS ASSOCIATION OF PRIVATE ICF/MR PROVIDERS, INC.

KATHLEEN E. SURGALLA,
JUDITH SUBJECK
New York State Association
for Retarded Children, Inc.
Erie County Chapter
101 Oak Street
Buffalo, New York 14203

JAMES R. SHELDON, JR.
Western New York Protection
and Advocacy Office for the
Developmentally Disabled
Neighborhood Legal Services,
Inc.
495 Ellicott Square Building
295 Main Street
Buffalo, New York 14203

LEWIS GOLINKER
(Counsel of Record)
HERBERT SEMMEL
New York Lawyers for the
Public Interest, Inc.
36 West 44th Street
New York, New York 10036
(212) 575-5138

PETER MARGULIES
New York Law School
57 Worth Street
New York, New York 10013

MURRAY LEVINE
Department of Psychology
SUNY at Buffalo
Buffalo, New York 14226

Attorneys for Amici Curiae

PRINTINGHOUSE PRESS—(212) 719-3120

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Motion for Permission to File Brief *Amicus Curiae*	xiii
Interest of the *Amicus*	xv
Brief *Amicus Curiae*	1
Summary of Argument	2
Argument	3
I. EXPERIENCE, DOCUMENTED BY STUDIES, HAS PROVED THAT GROUP HOMES MAKE GOOD NEIGHBORS AND DO NOT AFFECT THE SAFETY OR CHARACTER OF NEIGHBORHOODS OR PROPERTY VALUES	3
A. Most Of The Six And One-Half Million Mentally Retarded Americans Already Reside In The General Community	4
B. Housing In The Community Is The Most Pressing Current Need Of Mentally Retarded People	6
C. Mentally Retarded Citizens Make Good Neighbors And Do Not Negatively Affect Communities	9
D. Mentally Retarded People Are Safe, Well Supervised Residents Posing No Threat To Their Neighbors	12
E. Group Homes Do Not Cause Property Values To Decline Or Neighborhood Characteristics To Change	15
F. Community Acceptance Of Group Homes Follows Their Establishment	18

PAGE

II. THE OSTENSIBLE PROTECTION OF MENTALLY RETARDED PERSONS ASSERTED BY PETITIONERS HAD NO RATIONAL BASIS AND WAS A PRETEXT FOR THE EXCLUSION OF THE GROUP HOME FROM THE AREA. 19

A. The City Council Had No Knowledge Of Needs Of Mentally Retarded Persons And No Standards For Protecting Them 19

B. The Ad-Hoc Classification Of The Group Home As A "Hospital For The Feeble Minded".... 21

C. The Pretext Of The Five Hundred Year Flood Plain 22

D. The Pretext Of Space And Density Concerns 24

Conclusion 27

Appendix A

Federal Statutes Promoting The Development Of Community Based Residential Settings And Services For Mentally Retarded People 1a

TABLE OF AUTHORITIES

A. CASES

PAGE

City of White Plains v. Ferraioli, 34 N.Y.2d 300, 357 N.Y.S.2d 449 (1974) 17n.26

Crane Neck Assoc. v. NYC/Long Island County Services Group, 61 N.Y.2d 154, 460 N.Y.S.2d 69 (1984), *appeal dismissed and cert. denied*, ____ U.S. ____, 105 S. Ct. 60 (1984) 17n.25

Costley v. Caromin House, 313 N.W.2d 21 (Minn. 1981) 21

Crowley v. Knapp, 94 Wis. 2d 42, 288 N.W.2d 815 (1979) 21

Garcia v. Siffrin Residential Assoc., 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980) 15n.18

Group Home of Port Washington v. Board of Zoning & Appeals, 45 N.Y.2d 266, 408 N.Y.S.2d 377 (1978) ... 17n.26

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 26

J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, 274 S.E.2d 174 (1981) . 15n.18, 17n.26, 21, 22

Macon Assoc. for Retarded Citizens v. Macon-Bibb Cty. Pl. & Zoning Comm'n, 314 S.E.2d 218 (Ga. 1984), *appeal dismissed*, ____ U.S. ____, 105 S. Ct. 57 (1984) 25n.32

New York State Assoc. for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) 8

New York State Association for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983) 6n.3

New York State Association for Retarded Children v. Carey, 711 F.2d 1136 (2d Cir. 1983) 8

PAGE

Northwest Residence, Inc. v. City of Brooklyn Center, 352 N.W.2d 764 (Minn. App. 1984) 15n.18

People v. 11 Cornwell Co., 695 F.2d 34 (2d Cir. 1982) 13n.5

Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981) 20

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) 3

Society for Good Will to Retarded Children v. Cuomo, 572 F. Supp. 1300 (E.D.N.Y. 1983), *rev'd* 737 F.2d 1239 (2d Cir. 1984) 15n.18, 18n.27

State v. District Court, 609 P.2d 245 (Mont. 1980) 17n.26

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) 3

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 25n.32

B. STATUTES

(1) Federal

Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 *et seq.* (1976) 7

Housing Act of 1959, 12 U.S.C. § 1701q 7

Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 210(b), 88 Stat. 633 (1974) ... 7

42 U.S.C. § 1396d(c) and (d) 7

12 U.S.C. § 1701(h) 7

(2) State

PAGE

Georgia Community Services Act for the Mentally Retarded, O.G.C.A. § 37-5-2 (Code Ann. § 99-3302) 7n.5

New York Mental Hygiene Law § 41.33 ..... 7n.5

New York Mental Hygiene Law, § 41.34 (McKinney Supp. 1984-1985) 7n.5, 11n.12, 17n.25

New York Mental Hygiene Law § 41.36 ..... 7n.5

New York Mental Hygiene Law § 41.37 ..... 7n.5

Texas Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Art. 5547-300 ..... 7n.5

Texas Mental Health and Mental Retardation Act of 1965, Tex. Rev. Civ. Stat. Art. 5547-201 *et seq.* .. 7n.5

D. REGULATIONS

United States Water Resources Council, Flood Management Guidelines for Implementing Executive Order 11988, 43 Fed. Reg. 6030 (Feb. 10, 1978) 23, 24

Title 42 C.F.R. § 442 *et seq.* 13, 14, 20, 23, 26

Texas Administrative Code, Title 40, § 27 *et seq.* . 13, 14 20, 22, 23, 26

F. BOOKS AND ARTICLES

G. Allport, The Nature of Prejudice (1958) 11

B. Baker, Seltzer & Seltzer, As Close as Possible: Community Residences for Mentally Retarded Adults (1974) 5n.1, 9n.7, 10n.10, 18

Berdiansky and Parker, *Establishing an Group Home for the Adult Mentally Retarded in North Carolina*, 15 Mental Retardation 8 (1977) . 10n.10, 12n.13, 13n.14

PAGE

R. Bruininks, *et al.* eds., Deinstitutionalization and Community Adjustment of Mentally Retarded People (1981)

Scheerenberger, *Deinstitutionalization Trends and Difficulties* 5

Bruininks, *et al.*, *Recent Growth and Status of Community Residence Alternatives* 5n.1

Collins and Broeneweg, Effects on Real Estate Transactions of Group Home Developments (unpubl. report: Vocational and Rehabilitation Research Institute, Calgary, Alberta 1982) 16n.19, 16n.22, 17n.23

Colombatto, *et al.*, *Perspectives on Deinstitutionalization*, 17 Educ. and Training of the Mentally Retarded 6 (1982) 10n.10, 12n.13, 13n.14

Dolan and Wolpert, Long Term Neighborhood Property Impacts of Group Homes for Mentally Retarded People (unpubl. report: Princeton Univ. Nov. 1982) 16n.19, 16n.22, 17n.26

Dybwad and Herr, *Unnecessary Coercion: An End to Involuntary Commitment of Retarded Persons*, 31 Stan. L. Rev. 753 (1979) 13n.14

Edgerton and Bercovici, *Failure in Community Adaptation: The Relativity of Assessment*, in Environment and Behavior: The Adaptation of Mentally Retarded Persons (K. Kerman, Begab, & Edgerton, eds. 1983) 13n.14

Gallup Organization Report for the President's Committee on Mental Retardation, *Public Attitudes Regarding Mental Retardation*, in Mental Retardation: Century of Decision (R. Nathan Ed. 1976) 11n.11

PAGE

E. Gollay, Coming Back: The Community Experiences of Deinstitutionalized Mentally Retarded People (1978) 10n.10, 14n.16

Goodale and Wickwire, *Group Homes and Property Values in Residential Areas*, 19 Plan Canada 154 (1979) 16n.19, 16n.20, 16n.21, 16n.22, 17n.23

Hopperton, Zoning for Community Homes: Technical Assistance Handbook for Municipal Officials (unpubl. report: Ohio St. Univ. College of Law Dec. 1975) 17n.25, 21n.29

Huey, *Placing the Mentally Retarded: Where Shall They Live?* 29 Hosp. and Community Psychiatry 596 (1978) 18

Janicki, Mayeda & Epple, *Availability of Group Homes for Persons with Mental Retardation in the United States*, 21 Mental Retardation 45 (1983) 5, 9n.8, 9n.9

Kastner, Reppucci & Pezzoli, *Assessing Community Attitudes toward Mentally Retarded Persons*, 84 Am. J. Mental Deficiency 137 (1979) 11n.11

Knowles and Baba, The Social Impact of Group Homes (unpubl. report: Green Bay Wis. Planning Comm'n 1973) *cited in* D. Lauber and F. Bangs, Zoning for Family & Group Care Facilities (Am. Society of Planning Officials, Planning Advisory Report No. 300 March 1974) 16n.22, 17n.24, 17

D. Lauber and F. Bangs, Zoning for Family & Group Care Facilities (Am. Society of Planning Officials, Planning Advisory Service Rept. 300 March 1974) 12n.13, 16n.19, 17n.25, 21n.29

PAGE

Lindauer, Tung & O'Donnell, The Effect of Community Residences for the Mentally Retarded on Real Estate Values in the Neighborhoods in which they are Located (unpubl. report: SUNY Brockport 1980) 16n.19, 16n.21

Lippincott, *"A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 Stan. L. Rev. 767 (1979) 11n.12

Lubin, *et al.*, *Community Acceptance of Residential Programs for Developmentally Disabled Persons*, 3 Applied Research in Mental Retardation 191 (1982) 10n.10

Lubin, *et al.*, The Likelihood of Police Contacts with Developmentally Disabled Persons in Community Residences (unpubl. rept.: New York State Office of Mental Retardation and Developmental Disabilities Feb. 1982) 12, 13n.14

Mambort, Thomas & Few, Community Acceptance (unpubl. report: Montgomery, Ohio Board of the Mentally Retarded and Developmentally Disabled 1981) 16n.19, 16n.21, 16n.22, 17n.26

R. Mamula and N. Newman, Community Placement of the Mentally Retarded (1973) 9n.7, 12, 19

Margolis and Charitonidis, *Public Reactions to Housing for the Mentally Retarded*, 48 Exceptional Children 68 (1981) 12n.13, 13n.14

Minnesota Developmental Disabilities Program, An Analysis of Minnesota Property Values of Community Intermediate Care Facilities for the Mentally Retarded (ICF-MR's) (unpubl. report: State of Minn. Dept. of Energy, Planning and Development 1982) 16n.19, 16n.22

PAGE

New York State Health Planning Commission, Community Alternatives: Changing Directions for Long Term Care (unpubl. report: New York State Systems Development Project Dec. 1981) 8

New York State Office of Mental Retardation and Developmental Disabilities, New York State Plan: Mental Retardation and Developmental Disability (1981-1984) (Oct. 1980) 8

New York State Senate Mental Hygiene and Addiction Control Committee, Site Selection of Community Residences for the Mentally Disabled: Historical Perspective and Legislation (April 1979) 17n.25

Nihira and Nihira, *Jeopardy in Community Placement*, 79 Am. J. Mental Deficiency 538 (1975) 13n.14

Nirje, *The Normalization Principle and its Human Management Implications in President's Committee on Mental Retardation*, Changing Patterns for the Mentally Retarded (R. Kugel and W. Wolfensberger, eds. 1969) 6n.4

G. O'Connor, Home is a Good Place (1976) ... 9n.8, 10, 17n.26, 18

Okolo and Guskin, *Community Attitudes Toward Community Placement of Mentally Retarded People* 12 Internat. Review of Research in Mental Retardation 25 (1984) 12n.13

Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary (unpubl. report: Temple Univ. Nov. 1983) 9n.7, 10n.10, 19n.28

D. Rothman & S. Rothman, The Willowbrook Wars: A Decade of Struggle for Social Justice (1984) . 4, 19n.28

Schalock, Harper & Genung, *Community Integration of Mentally Retarded Adults*, 85 Am. J. Mental Deficiency 478 (1981) 13n.14

PAGE

Sigelman, Spahnel & Lorenzen, *Community Reactions to Deinstitutionalization*, 45 J. Rehabilitation 52 (1979) 12n.13, 18

Sitkei, Two Year Follow-Up on Mobility Rates for a Sample of Group Homes for Developmentally Disabled Persons (unpubl. paper June, 1976) cited in Sigelman, Spahnel & Lorenzen, *Community Reaction to Deinstitutionalization*, 45 J. Rehabilitation 52 (1979) 12

Stacey, Doleys & Malcolm, *Effects of Social Skills Training in a Community-Based Program*, 84 Am. J. Mental Deficiency 152 (1979) 9n.7

Trippi, *et al.*, *Housing Discrimination Toward Mentally Retarded Persons*, 44 Exceptional Children 430 (1978) 13n.14

U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (Sept. 1983) 9n.7

U.S. General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* (Aug. 1983) 10n.10

Wagner and Mitchell, Group Homes and Property Values: A Second Look (unpubl. report: Metropolitan Human Services Comm'n, Columbus, Ohio Aug. 1980) 16n.19, 16n.20, 17n.23, 17n.24

Wehbring and Ogren, Community Residences for Mentally Retarded People: A Study of Seven Community Residences (unpubl. rept.: National Assoc. of Retarded Citizens May 1975) 12n.13, 13n.14

Wehman, *A Leisure Time Activities Curriculum for the Developmentally Disabled*, 11 Educ. and Training of the Mentally Retarded 309 (1976) 14n.16

PAGE

Wickwire and Goodale, *Promoting and Resisting Group Homes: The Property Value Issue*, 7 Leisurability 24 (1980) 16n.19

Wiener, Anderson & Nietupski, *Impact of Community-Based Residential Facilities for Mentally Retarded Adults on Surrounding Property Values Using Realtor Analysis Methods*, 17 Educ. and Training of the Mentally Retarded 278 (1982) 16n.19, 17n.24, 17n.26

Witt, *Increase in Adaptive Behavior Level After Residence in an Intermediate Care Facility for Mentally Retarded Persons*, 19 Mental Retardation 75 (1981) 9n.7

Wolpert, Group Homes for the Mentally Retarded: An Investigation of Neighborhood Property Impacts (unpubl. report: Princeton Univ. Aug. 1978) ... 16n.19, 16n.22

F. OTHER AUTHORITIES

H. R. Rep. 94-58, 94th Cong., 1st Sess. (1975) 7n.6

President's Message, 88th Cong., 1st Sess., reprinted in [1963] U.S. Code Cong. & Admin. News, 1466 (Feb. 5, 1963) 6

No. 84-468

In the

Supreme Court of the United States

October Term, 1984

City of Cleburne, Texas, et al.,

Petitioners,

-v.-

Cleburne Living Center, Inc., et al.,

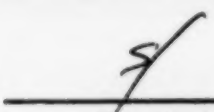
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* FOR THE NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS INC., NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED, INC., NATIONAL REHABILITATION ASSOCIATION, INTERNATIONAL LEAGUE OF SOCIETIES FOR PERSONS WITH MENTAL HANDICAP, AND TEXAS ASSOCIATION OF PRIVATE ICF/MR PROVIDERS, INC.

The National Conference of Catholic Charities, the National Association of Protection and Advocacy Systems, Inc. (NAPAS), the National Association of Private Residential Facilities for the Mentally Retarded, Inc. (NAPRFMR), the National Rehabilitation Association, the International League of Societies for Persons with Mental Handicap, and the Texas Association of Private ICF/MR Providers, Inc. respectfully move this Court for permission to file the accompanying brief *Amicus Curiae* in support of respondents. Consent to file this brief has been sought from the parties. Respondents have consented but counsel for Petitioners never replied. Leave of this Court therefore is requested under Rule 36.

The interest of the *amici* is set forth below. The accompanying brief addresses issues of fact and law pertaining to community attitudes toward, and community acceptance of, community-based residential facilities for the mentally retarded, and the need for such community based housing opportunities by mentally retarded people. *Amici* also provide background information in the form of research studies discussing the asserted rationales of the petitioners to prohibit the establishment of the group home proposed by respondents. These issues have not been discussed by petitioners, and *amici* have reason to believe that their brief will supplement rather than reiterate the arguments made by respondents.



Lewis A. Golinker
Counsel of Record
New York Lawyers for the
Public Interest, Inc.
36 West 44th Street
New York, New York 10036
(212) 575-5138

INTEREST OF THE *AMICI*

National Conference of Catholic Charities

The National Conference of Catholic Charities is the national coordinating body for human services provided by the 170 dioceses of the Roman Catholic Church. The National Conference conducts research, disseminates information and publishes *Charities USA* and *Social Thought*. The Conference also conducts training programs, seminars and other activities to assist local agencies to better carry out their programs. It also acts as the government relations liaison for the local programs. One of the many services delivered nationally through more than 1,000 agencies is the operation of community based housing facilities for mentally retarded people. Agencies of the Roman Catholic Church are one of the largest providers of such community based living arrangements in the United States.

National Association of Protection Advocacy Systems, Inc.

The National Association of Protection and Advocacy Systems, Inc. (NAPAS) is a national association consisting of the state- and territorial-wide protection and advocacy systems for the developmentally disabled, as mandated by the federal Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. 6001 *et seq.* NAPAS members have, as part of their mandate, the pursuit of "legal, administrative, and other appropriate remedies to insure the protection of the rights" of mentally retarded and developmentally disabled persons. 42 U.S.C. § 6012. They devote significant resources to the problems of developing appropriate community-based living arrangements, including providing information about mental retardation to local officials and community residents to alleviate community opposition to group homes, when it arises.

National Association of Private Residential Facilities For the Mentally Retarded, Inc.

The National Association of Private Residential Facilities for the Mentally Retarded, Inc. (NAPRFMR) is a national association that represents and assists approximately 500 providers of community-based residential care and services to approximately 20,000 people with developmental disabilities in 48 states and the District of Columbia. NAPRFMR conducts legislative advocacy, training programs and other activities to enable providers to appropriately meet the needs of their clients and improve the quality of life of the people they serve. Eligibility for active membership is restricted to facilities whose population is comprised primarily of people who are mentally retarded. The facility must also be licensed, certified or approved in its home state if such licensing, certification or approval is required by the state. NAPRFMR members range in size from family care homes serving one or two persons to large multi-service agencies which serve more than one hundred people at a single site. About 41% of its members serve 16 or fewer persons, 33% serve 17 to 50 persons, 15% serve between 50 and 100 persons and 14% serve more than 100 individuals. Together they offer a full range of residential services. Many are certified as intermediate care facilities for the mentally retarded under the Medicaid program. About 60% of the NAPRFMR members are nonprofit agencies, approximately 30% are proprietary and 10% are unincorporated family care providers.

National Rehabilitation Association

The National Rehabilitation Association is a national organization comprised of disabled persons including those with mental retardation, professional rehabilitation workers, medical professionals and others advocating for and providing rehabilitation and habilitation services to persons with disabilities. The Association's purpose is to develop the public awareness of the need for, and advocate the removal of attitudinal, architectural and legal barriers that prevent the full integration of disabled people into society. It achieves its purposes through legislative

advocacy, sponsorship of research, publication of the *Journal of Rehabilitation*, and by conducting educational, informational and training programs.

International League of Societies For Persons With Mental Handicap

The International League of Societies for Persons with Mental Handicap is composed of eighty-six organizations in sixty-five countries on five continents dedicated to advancing the rights and interests of mentally handicapped people. The individual members of these organizations are consumers, parents, educators, therapists, jurists, doctors and other professionals in the field of mental retardation. Founded in 1960, the International League has consultative status with UNESCO, the Council of Europe and other international agencies. Among its other activities, the International League provides experts who offer technical assistance in developing services for mentally handicapped individuals, including residential services, develops and disseminates educational literature concerning their rights and needs, and helps promote the provision of services necessary to enable these citizens to participate fully in society to their maximum potential.

Texas Association of Private ICF/MR Providers

The Texas Association of Private ICF/MR Providers is a statewide association consisting of 27 private organizations in Texas that provide community-based residential care and services in 80 settings to approximately 3,700 mentally retarded and developmentally disabled people. Respondent Cleburne Living Center (now called Community Living Concepts) is a member of the Association. The Association conducts advocacy with the Texas Legislature and State agencies responsible for regulating community-based residential facilities certified as ICF/MRs, and provides training and information to its members so that the mentally retarded people they serve obtain the highest quality of services and attain the highest quality of life that is possible.

No. 84-468

In the

Supreme Court of the United States

October Term, 1984

City of Cleburne, Texas, et al.,

Petitioners,

- v. -

Cleburne Living Center, Inc., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NATIONAL CONFERENCE OF CATHOLIC CHARITIES, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS INC., NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED, INC., NATIONAL REHABILITATION ASSOCIATION, INTERNATIONAL LEAGUE OF SOCIETIES FOR PERSONS WITH MENTAL HANDICAP, AND TEXAS ASSOCIATION OF PRIVATE ICF/MR PROVIDERS, INC.

SUMMARY OF ARGUMENT

The discrimination practiced by the City of Cleburne, Texas against thirteen mildly to moderately mentally retarded adults who would live in a group home in that community is a classic example of historic deep-seated prejudice that still lingers in some communities. The prejudice against the retarded shown here, like most prejudice, is the result of ignorance and irrational fear. As the Court of Appeals pointedly observed, the prejudice results in "segregation of one group from the rest of society", and "[s]uch segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions". (J.A. 114; 726 F.2d at 192).

The actual experience of communities in which mentally retarded people live in group homes demonstrates that no rational basis exists for the exclusion of such a group home from an area in Cleburne which is open to virtually every other form of residential setting and institution, from single family homes to boarding houses, apartment houses, hospitals and nursing homes, without any requirement of a special use permit. Most communities have accepted group homes for mentally retarded persons without opposition and no adverse consequences have resulted. Moreover, housing is perhaps the most pressing need of mentally retarded people, partially because of the increasing numbers of older retarded adults and partly because of the public policy of deinstitutionalization.

Experience has demonstrated that mentally retarded persons make good neighbors. For example, they are not prone to violent or criminal behavior and their involvement with the police is substantially lower than that of the population generally. Group homes have had no adverse impacts on property values and have not resulted in changing neighborhood characteristics. The ultimate judgment on group homes is found in communities that originally opposed their establishment. Once the homes were established community acceptance almost inevitably followed.

The City of Cleburne rejected the special use permit based on the irrational fears and in part on ostensible "protection" of the mentally retarded residents. The City Council had no knowl-

edge of the needs of mentally retarded persons and acted without guidelines to deny a permit even though the home met the extensive federal and state regulations governing these group homes.

The true exclusionary purpose of the City Council's action is revealed by the tortured argument that the home is a "hospital" even though no physicians or registered nurses are regularly on the premises. The City Council also applied criteria of a five hundred year flood plain to a group home with completely ambulatory persons while allowing bed-ridden hospital and nursing home patients to live in the very same location. It applied space and density requirements to the group home on an ad hoc basis when the City does not apply any such restrictions to any other residential use, or to hospitals or nursing homes. The special use permit was denied to the group home even though it met all the requirements of federal and state regulations in effect at the time the application was rejected.

For these reasons, *amici curiae* submit that the decision below should be affirmed under the "rational basis test". *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). If this Court were to reach the issue of whether heightened judicial scrutiny of discriminatory treatment of the retarded is appropriate, *amici curiae* agree with the analysis of the Court of Appeals panel decision (J.A. 112 *et seq.* 726 F.2d 192) that the mentally retarded fit precisely within the category of the discrete and insular minority that commands extraordinary protection from the majoritarian political process. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

I. EXPERIENCE, DOCUMENTED BY STUDIES, HAS PROVED THAT THE MENTALLY RETARDED PERSONS LIVING IN GROUP HOMES MAKE GOOD NEIGHBORS AND DO NOT AFFECT THE SAFETY OR CHARACTER OF NEIGHBORHOODS OR PROPERTY VALUES.

When group homes for mentally retarded people have been permitted to open, integration into community life of both the homes and their residents, and eventual community acceptance

are the rule, even in communities that expressed initial hostility. Rothman and Rothman describe the end result:

> Communities invariably took their defeats gracefully. Once a group home opened, it was never the object of vandalism or even picketing. Not one group home for the Willowbrook class had to close down or transfer its residents because of the persistent hostility of local organizations. Not a single member of the Willowbrook class living in a group home was ever injured or so much as intimidated by antagonistic neighbors. Controversy preceded the opening of a residence. But once the home was in business, indifference, and even occasionally approval, took over.

D. Rothman & S. Rothman, The Willowbrook Wars: A Decade of Struggle for Social Justice 196 (1984).

A. Most Of The Six And One Half Million Mentally Retarded Americans Already Reside In The General Community

Mental retardation is estimated to affect as many as six and one half million Americans (T. 141) who can be found in every state, at every age level, and among all races, ethnic groups and economic classes. Most mentally retarded individuals live, learn, work and play in our communities: as children, living at home and attending our public schools; as adults, living independently if they are able or living with relatives or in group homes if they are not.[1] "At no time have more than approximately 3% of

---

1 The District Court found that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded." (J.A. 94, Finding of Fact 30). There are no such group homes in Cleburne. (J.A. 94, Finding of Fact 31). It is more accurate to say that group homes are the principal living alternatives for those whose parents are too old, ill or otherwise unable to care for them and for those leaving large institutional

(Footnote continued on next page)

the total mentally retarded population ever resided in an institution."[2] R. Scheerenberger, *Deinstitutionalization: Trends and Difficulties*, in Deinstitutionalization and Community Adjustment of Mentally Retarded People 3 (R. Bruininks, *et al.* Eds. 1981). In 1983, it was estimated that 110,000 to 130,000 persons live in large institutions. Janicki, Mayeda & Epple, *Availability of Group Homes for Persons with Mental Retardation in the United States*, 21 Mental Retardation 45, 49 (1983).

Cleburne is no different from other communities in regard to the mentally retarded people in its midst. There are at least 30 mentally retarded children in the City's public schools (J.A. 92, Finding of Fact 21) and the record identified other mentally retarded adults who are living at home with their parents (Tr. 125-26; 186; 213; 217; 221; 226-41) or in a local nursing home with an aged relative (Tr. 186; 214; 217). There also is a sheltered workshop in the City offering employment to mentally retarded workers. (Tr. 71; 221; 225). For those Cleburne residents who would live in the group home (Tr. 125-26; 186; 213-14; 217; 221; 226-41), the establishment of that home would do no more

---

(Footnote continued from previous page)

residences. *See*, R. Bruininks *et al.*, *Recent Growth and Status of Community Residence Alternatives*, in Deinstitutionalization and Community Adjustment of Mentally Retarded People 15 (R. Bruininks, *et al.* Eds. 1981) (prevention of admission to institutions by finding and developing alternative community methods of care and training is one of the core concepts of deinstitutionalization); B. Baker, Seltzer & Seltzer, As Close As Possible: Community Residences for Mentally Retarded Adults 3 (1974) (group homes are required for people who are unable to continue living with their parents, but cannot live on their own); (T. 71) (group homes needed for never-institutionalized people whose parents are of advancing age as well as for bringing previously institutionalized people back to their communities).

2 The term "institutions" in the literature generally refers to a large, segregated facility. Small group homes such as those involved in Cleburne are regarded as community based residential facilities.

than allow them to move from one supervised living setting in Cleburne to another. (T. 71)[3]

B. Housing In The Community Is Perhaps The Most Pressing Current Need Of Mentally Retarded People.

The need for appropriate community-based housing for mentally retarded people has increased drastically in the last twenty years as a result of the development of federal and state policies and programs for community rather than institutional care of all mentally retarded people. A consensus favoring community care has emerged among governmental decision makers and professional experts based on the principles of normalization, least restrictive alternative and the developmental model of programs and services. These concepts are directly opposed to the historical predominance of institutional care, which isolates people from the rhythms and opportunities of an integrated community life.[4]

In 1963, President Kennedy presented a legislative package offering a "bold new initiative" to "reduce over a number of years, and by hundreds of thousands, the persons confined to . . . institutions" and "to retain in and return to the community the . . . mentally retarded". President's Message, 88th Cong. 1st Sess., *reprinted in* [1963] U.S. Code Cong. & Admin. News, 1466, 1467-68 (Feb. 5, 1963). Congress has since enacted a series of laws to achieve this goal. See appendix A for a listing of these acts.

---

3 *See New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 966 (2d Cir. 1983) (New York State has borough or county of origin program for community return of institutionalized mentally retarded people, in part to improve community acceptance and allay concern that group home residents are outsiders).

4 *See* Nirje, *The Normalization Principle and Its Human Management Implications* in President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded, 179, 186-87 (R. Kugel & W. Wolfensberger Eds. 1969) (the size, regimentation, and monotony of institutions make it impossible for them to maintain normal rhythms of daily personal care, vocational or leisure activities).

In one important development Congress amended the Housing Act of 1959, 12 U.S.C. § 1701q, to include subsidies for construction of residential facilities for developmentally disabled persons. Housing and Community Development Act of 1974, P.L. 93-383, § 210(b), 88 Stat. 633 (1974). At least fifty million dollars annually must be made available for programs for the handicapped, 12 U.S.C. § 1701(h). Congress has also funded both construction and operation of community group homes for the mentally retarded by classifying them as Intermediate Care Facilities (ICF-MR) eligible for reimbursement under the Medicaid program. 42 U.S.C. § 1396d(c) and (d). The group home respondents would establish in Cleburne will be such an ICF-MR facility. (J.A. 92, Finding of Fact 20).[5]

In another enactment, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 *et seq.* (1976), Congress stated that developmentally disabled people should receive services designed to maximize their developmental potential in a setting that is least restrictive of their personal liberty. 42 U.S.C. § 6010(2).[6]

Nonetheless, the current unmet demand for community residence spaces is overwhelming. Although New York operates one of the largest group home programs in the nation, it is

---

5 States have adopted similar community integration programs. *See, e.g.*, Texas Mental Health and Mental Retardation Act of 1965, Tex. Rev. Civ. Stat., art. 5547-201 *et seq.*; Texas Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat., art. 5547-300; New York Mental Hygiene Law § 41.33, 41.34; 41.36 and 41.37; Georgia Community Services Act for the Mentally Retarded, O.G.C.A. § 37-5-2 (Code Ann. § 99-3302). For example, the Georgia statute states:

> The primary purpose of this chapter shall be to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities.

6 Congress authorized funding for deinstitutionalization to community based placements, based on its belief that institutional care is both "inappropriate and inhumane" for most mentally retarded people. H.R. Rep. 94-58, 94th Cong. 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Admin. News, 919, 933 (1975).

able to accommodate only approximately 11 percent of the mentally retarded people who are in need of them. New York Office of Mental Retardation and Developmental Disabilities, New York State Plan: Mental Retardation and Developmental Disability (1981-1984), 144, 150 (Oct. 1980). In that one state alone, more than 34,800 mentally retarded people who in 1980 should have had community residence placements were unserved. *Id.* The time table for community placements set forth in the "Willowbrook Consent Decree" approved in *New York State Assoc. for Retarded Children v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975), has been postponed at least twice. *See New York State Assoc. for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir. 1983).

A second source of demand for housing for mentally retarded persons results from demographic considerations. A government commission has noted that among the persons born during the post-World War II baby boom are a

> largely unidentified [and uncounted] group of developmentally disabled individuals who are residing in the community with aging relatives. Due to the increased longevity of the disabled individuals, caregivers become increasingly unable to provide the support required due to their own advancing age. The formal system will then need to play an increased role in individuals' care and treatment of the older developmentally disabled.

New York State Health Planning Commission, Community Alternatives: Changing Directions for Long Term Care 32 (unpubl. report: New York State Systems Development Project Dec. 1981).

If community residents are to continue benefitting from the services or programs created to meet their needs, and if unnecessarily institutionalized people are to be discharged from those settings, appropriate community-based living arrangements must be available. Because of their mental retardation, many individuals require the assistance or supervision in their daily activities offered by group homes. As the district court found, the availability of such a home in communities is an essential ingredient of normal living patterns for mentally retarded

people. (J.A. 94, Finding of Fact 30). For some, that setting will merely be temporary: it will provide a transitional setting where the person can learn the skills needed to live more independently. For others it will be permanent. In either event, living in family-scale community homes results in substantial increases in level of functioning and generally positive behavioral change for people with all levels of retardation. People who leave institutions for the community quickly make significant adaptive behavior gains relative to those who remain institutionalized.[7]

C. Mentally Retarded Citizens Make Good Neighbors And Do Not Negatively Affect Communities.

During the past ten to fifteen years the number of group homes in the nation has increased from 611 in 1971-72 to 6,302 in 1983, and their population has increased approximately from 23,500 in 1977 to between 43,000 and 58,000 in 1983.[8] This growth in group homes has permitted a corresponding decline in institutionalized populations, as unnecessary admission to and retention in institutions is prevented.[9]

---

7 *See, e.g.*, Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary (unpubl. report: Temple Univ. Nov. 1983); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 34 (Sept. 1983); S. Witt, *Increase in Adaptive Behavior Level After Residence in an Intermediate Care Facility for Mentally Retarded Persons*, 19 Mental Retardation 75, 77 (1981); D. Stacey, Doleys & Malcolm, *Effects of Social Skills Training in a Community-Based Program*, 84 Am. J. Mental Deficiency 152 (1979); B. Baker, Seltzer & Seltzer, *supra*, note 1 at 219; R. Mamula & N. Newman, Community Placement of the Mentally Retarded 6-7, 58 (1973).

8 Janicki, Mayeda & Epple, *Availability of Group Homes for Persons With Mental Retardation in the United States*, 21 Mental Retardation 45, 47, 50 (1983). The growth of group homes in Texas has paralleled the national trend. In 1976, Texas ranked seventh among all states with 23 group homes serving 467 residents. G. O'Connor, Home is A Good Place 16 (1976); between 1976 and 1983, the total number of group homes increased by almost 900 percent to 227, and the total number of persons served increased by 400 percent to 2,343. Janicki, Mayeda & Epple, *supra*, 21 Mental Retardation at 49.

9 Janicki, Mayeda & Epple, *supra* note 8, 21 Mental Retardation at 50.

Increasing the number of group homes has been possible only as a result of public recognition that mentally retarded people do not negatively affect the communities in which they live. In fact, initial community opposition to proposed group homes is by far the exception, not the rule.

Research on the actual experience of community residential facilities confirms that community responses are generally positive. In one early survey of 105 group homes, community acceptance was reported by approximately two thirds of the respondents, G. O'Connor, Home is a Good Place 23 (1976), and subsequent research has reported consistent initial community acceptance rates.[10] In addition, a 1975 Gallup Poll commissioned by the President's Committee on Mental Retardation reported that 85 percent of the sample would not object to a

---

10 Pennhurst Longitudinal Study, *supra*, note 7 at 13 (community acceptance of group homes ranged from 62 to 84 percent); U.S. General Accounting Office, An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled 5 (Aug. 1983) (nationwide study of 535 group homes; 89 percent reported community acceptance); Lubin, *et al.*, *Community Acceptance of Residential Programs for Developmentally Disabled Persons*, 3 Applied Research in Mental Retardation 191 (1982) (community acceptance reported by 67 to 75 percent of respondents); E. Gollay, *et al.*, Coming Back 55 (1978) (80 percent of respondents reported community acceptance); B. Baker, Seltzer & Seltzer, *supra* note 1 at 215 (1977) (seven state study of group homes; 65 percent reported initial community acceptance); Berdiansky and Parker, *Establishing a Group Home for the Adult Mentally Retarded in North Carolina*, 15, Mental Retardation 8 (1977) (North Carolina group homes studied; 75 percent reported initial community acceptance).

In a survey of 279 superintendents of large public institutions for mentally retarded persons, 65 percent described the reactions of the surrounding community to placement efforts for institutionalized persons, as favorable or indifferent. Colombatto, *et al.*, *Perspectives on Deinstitutionalization*, 17 Educ. and Training of the Mentally Retarded, 6, 8 (1982).

group home of mildly or moderately mentally retarded people being located on their block.[11]

Despite the broad acceptance of mentally retarded people living in community-based group homes, irrational fears and negative attitudes continue to be held by some. Prejudice often is the result of ignorance resulting from the general public's lack of meaningful contact with their retarded peers. *See, e.g.*, G. Allport, The Nature of Prejudice (1958) (Separateness among groups leads to exaggeration of differences). If governmental discrimination against the retarded can be supported as rational based on the fears and prejudices of some members of the public, community integration of the retarded can be effectively frustrated.[12]

The Cleburne City Council relied on just such irrational fears in rejecting the application of the Cleburne Living Center; four of the seven factors were opposition of immediate neighbors, fears of the elderly, possible hostility from students at the junior high school across the street and "in general, the presentation made before the City Council." (J.A. 95, Finding of Fact 34).

---

11 Gallup Organization Report for the President's Committee on Mental Retardation, *Public Attitudes Regarding Mental Retardation*, in Mental Retardation: Century of Decision (R. Natham Ed. 1976); *see also* Kastner, Reppucci & Pezzoli, *Assessing Community Attitudes toward Mentally Retarded Persons*, 84 Am. J. Mental Deficiency 137, 142 (1979) (restructure of Gallup Poll questions to gauge public attitudes to a specific proposed group home in their community; 81 percent still would not object to a group home on their block).

12 Many states (but not Texas) have passed legislation to prevent local governments from using zoning ordinances to exclude group homes or to force them to locate in the poorest, most rundown sections whose residents lack organized political power. *See, e.g.*, New York Mental Hygiene Law § 41.34. *See also* M. Lippincott, *"A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 Stan. L. Rev. 767, 779 n.64 (1979) (citing 16 statutes in other states).

D. Mentally Retarded People Are Safe, Well Supervised Residents Posing No Threat To Their Neighbors.

Group home residents are rarely involved in behavioral or criminal incidents.[13] In a 2 year study of 1804 developmentally disabled persons living in the community, fewer than 1 percent were reported to have been in the custody of the law. E. Sitkei, Two Year Follow-Up on Mobility Rates for a Sample of Group Homes for Developmentally Disabled Persons (unpubl. paper June 1976), *cited in* Sigelman, Spahnel and Lorenzen, *Community Reaction to Deinstitutionalization*, 45 J. Rehabilitation, 52, 53 (1979). A second study of 20 family care homes in Fresno, California reported that 96 percent of the mentally retarded persons living there had no recorded behavioral difficulties in the community. R. Mamula and N. Newman, *supra*, note 7 at 59.

A recent study found that it is probably *safer* to be a neighbor of a group home because the arrest rate of 60 per thousand per year for adults in the general population is significantly higher than the 3 per thousand rate registered by mentally retarded residents of group homes. Lubin *et al.*, The Likelihood of Police Contacts with Developmentally Disabled Persons in Community Residences 5 (unpubl. report: New York State Office of Mental Retardation and Developmental Disabilities Feb. 1982). Few of the involvements of mentally retarded people with police were

---

13 Unfounded fear of mentally retarded people is frequently listed as a reason for opposing group homes. *See* Okolo and Guskin, *Community Attitudes Toward Community Placement of Mentally Retarded Persons*, 12 Internat. Review of Research in Mental Retardation 25, 52 (1984); J. Colombatto, *supra*, note 10, 17 Educ. and Training of the Mentally Retarded 6 (1982); Margolis and Charitomidis, *Public Reactions to Housing for the Mentally Retarded*, 48 Exceptional Children 68 (1981); C. Sigelman, Spahnel & Lorenzen, *Community Reactions to Deinstitutionalization*, 45 J. Rehabilitation 52 (1979); Berdiansky and Parker, *supra*, note 10, 15 Mental Retardation 8 (1977); Wehbring and Ogren, Community Residences for Mentally Retarded People (unpubl. report: National Assoc. of Retarded Citizens May 1975); D. Lauber and F. Bangs, Zoning for Family & Group Care Facilities (American Society of Planning Officials, Planning Advisory Service Report No. 300 March 1974).

for antisocial behavior; of the few calls for police assistance, most were made by group home staff, and not by neighbors. *Id.* There also was no relationship between size of the group home and the likelihood of police intervention. *Id.* at 4.

These and other studies confirm that there is no rational basis for the fear that mentally retarded residents in a group home will place neighbors at greater risk of harm than if the group home was not in the neighborhood.[14]

In Cleburne, the group home and its residents would be a safe, well-supervised home largely indistinguishable from the other homes and residents in the neighborhood. Under both federal and state regulations applicable to ICF-MRs, residents of the group home will be carefully selected after testing and evaluation. 42 C.F.R. §§ 442.418; .421; .422; .456; 40 Texas Admin. Code (T.A.C.) §§ 27.3001(a); (b); .3004; .3005; .3006; (T. 69-70). In a Level I home, all of the residents will be of similar ages, developmental levels and social needs. 42 C.F.R. § 442.444(a); 40 T.A.C. § 27.3212(a). All residents must require only minimal care and supervision on a daily basis.[15] They must be ambulatory, 40 T.A.C. §§ 27.105(4); .2801; (T. 66); evaluated to have either mild or moderate mental retardation,

---

14 *See* Lubin et al., Police Contacts, *supra*, at 5; Edgerton and Bercovici, *Failure in Community Adaptation: the Relativity of Assessment*, in Environment and Behavior: the Adaptation of Mentally Retarded Persons (K. Kerman, Begab & Edgerton Eds. 1983); Colombatto, *supra*, note 10, 17 Educ. & Training of the Mentally Retarded 6; Margolis and Charitonidis, *supra*, note 13, 48 Exceptional Children 681; Schalock, Harper & Genung, *Community Integration of Mentally Retarded Adults*, 85 Am. J. Mental Deficiency 478, 486 (1981); Sigelman, Spahnel and Lorenzen, *supra*, note 13, 45 J. Rehabilitation 52; Dybwad and Herr, *Unnecessary Coercion: An End to Involuntary Commitment of Retarded Persons*, 31 Stan. L. Rev. 753, 759 (1979); Trippi, *et al.*, *Housing Discrimination Toward Mentally Retarded Persons*, 44 Exceptional Children 430 (1978); Berdiansky and Parker, *supra*, note 10, 15 Mental Retardation 8; Nihira and Nihira, *Jeopardy in Community Placement*, 79 Am. J. Mental Deficiency 538 (1975); Wehbring and Ogren, *supra*, note 13.

15 *See* T. 140-41 (describing characteristics of mildly and moderately mentally retarded people); *see also People v. 11 Cornwell Co.*, 695 F.2d 34, 39n.2 (2d Cir. 1982) (describing characteristics of moderately mentally retarded people).

40 T.A.C. §§ 27.105(1); (T. 65); mild to moderate deficits in adaptive behavior, 40 T.A.C. § 27.105(2) and have no special health needs that would interfere with the program and services offered at the group home. 40 T.A.C. § 27.105(3). They also will be able to distinguish "right from wrong" (T. 109-111) and will not be aggressive (T. 110), mentally ill, alcoholic or felons. (T. 68).

The residents' lifestyle at the group home offers no support for community residents' fears. During the day, all the residents will be at work in the area, either in the competitive economy or in the local sheltered workshop. (J.A. 93, Finding of Fact 23); 40 T.A.C. § 27.105; (T. 67-68). At other times they will use community churches, shops, recreation facilities, and the library with as much or as little supervision as they individually require. 40 T.A.C. § 27.105; (T. 70; 192). During their unscheduled leisure time (which must not be for more than 3 continuous hours, 42 C.F.R. § 442.435(a)(1); 40 T.A.C. § 27.3203) residents will watch television or listen to the radio, visit friends, eat out, or go to the movies, just as most of the rest of us do.[16] Trained staff will be present 24 hours per day to respond to any resident's needs or an emergency. 42 C.F.R. § 442.481(f); 40 T.A.C. § 27.3804(f).

---

16 *See, e.g.*, T. 232. One researcher reported the following as the most common leisure time activities among group home residents: watching television or listening to the radio, shopping, movies, parties, church, visiting friends and participation in sports. She concluded "[t]his represents a reasonable mix of activities in the home, structured activities with groups and exposure to community activities." E. Gollay, *supra* note 10 at 84. *See also* Wehman, *A Leisure Time Activities Curriculum for the Developmentally Disabled*, 11 Educ. and Training of the Mentally Retarded 309 (1976) (greater diversity in lifestyle can be obtained if leisure time is used constructively, including developing hobbies and friendships).

E. Group Homes Do Not Cause Property Values To Decline Or Neighborhood Characteristics To Change.[17]

The lack of negative impacts caused by group homes has been confirmed in numerous studies over a ten year period. Indeed, courts, when presented with results of empirical studies like those cited herein, have observed that the fears of diminished property values are without factual basis.[18]

---

17 The City Council decision to deny the permit was based on conclusory statements of the community residents' opposition and fears, yet there is nothing in the record to show that the group home "will seriously injure the appropriate use of neighboring property", a finding required by the zoning ordinance. Zoning Ordinance, Section 16 (J.A. 62).

18 *See, Society For Good Will to Retarded Children, Inc. v. Cuomo*, 572 F. Supp. 1300, 1340-41 (E.D.N.Y. 1983) *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984); *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 68-69 n.7, 274 S.E. 2d 174, 178 n.7 (1981) (referring to study of National Association of Realtors which found that property values had increased and not gone down in areas where group homes for the retarded were placed); *cf. Northwest Residence, Inc. v. City of Brooklyn Center*, 352 N.W. 2d 764, 770 (Minn. App. 1984) (court issued writ of mandamus compelling City Council to issue a special use permit for group home housing mentally ill, relying in part on national literature search by Minneapolis Planning Commission which found that there was no demonstration of decrease in property values unless there were five facilities in a block).

In the only case cited by petitioners where a court sustained a finding of diminished property values associated with location of a group home for the retarded, the court did not rely on results from an empirical study; instead, the finding was based on testimony of one real estate broker. *Garcia v. Siffrin Residential Assn.*, 63 Ohio St. 2d 259, 407 N.E. 2d 1369, 1380 (1980).

The presence of a group home has no effect on selling price,[19] on the percent of the sales price to the asking price,[20] on the rate of appreciation of property values,[21] on the rate of property turnover,[22] or on length of time the property is on the

---

19 Dolan and Wolpert, Long Term Neighborhood Property Impacts of Group Homes for Mentally Retarded People (unpubl. report: Princeton Univ. Nov. 1982); D. Weiner, Anderson & Nietupski, *Impact of Community-Based Residential Facilities for Mentally Retarded Adults on Surrounding Property Values Using Realtor Analysis Methods*, 17 Educ. and Training of the Mentally Retarded 278 (1982); Minnesota Developmental Disabilities Program, An Analysis of Minnesota Property Values of Community Intermediate Care Facilities for the Mentally Retarded (ICF-MRs) (unpubl. report: State of Minn. Dep't of Energy, Planning and Development 1982); Collins and Broeneweg, Effects on Real Estate Transactions of Group Home Developments (unpubl. report: Vocational and Rehabilitation Research Institute, Calgary, Alberta 1982); Mambort, Thomas & Few, Community Acceptance (unpubl. report: Montgomery, Ohio Board of the Mentally Retarded and Developmentally Disabled 1981); Wagner and Mitchell, Group Homes and Property Values: A Second Look (unpubl. report: Metropolitan Human Services Comm'n Columbus, Ohio Aug. 1980); Wickwire and Goodale, *Promoting and Resisting Group Homes: The Property Value Issue*, 7 Leisurability 24 (1980); Lindauer, Tung & O'Donnell, The Effect of Community Residences for the Mentally Retarded on Real Estate Values in the Neighborhoods in which They are Located (unpubl. report: New York State Univ. College at Brockport, 1980); Goodale and Wickwire, *Group Homes and Property Values in Residential Areas*, 19 Plan Canada 154 (1979); Wolpert, Group Homes for the Mentally Retarded: An Investigation of Neighborhood Property Impacts (unpubl. report: Princeton Univ. Aug. 1978); D. Lauber and F. Bangs, *supra* note 13.

20 Wagner and Mitchell, *supra* note 19; Goodale and Wickwire, *supra* note 19, 19 Plan Canada at 161.

21 Mambort, Thomas & Few, *supra* note 19; Lindauer, Tung & O'Donnell, *supra* note 19; Goodale and Wickwire, *supra* note 19, 19 Plan Canada at 161.

22 Dolan and Wolpert, *supra* note 19 at 5, 12; Minnesota Developmental Disabilities Program, *supra* note 19; Collins and Broeneweg, *supra* note 19; Mambort, Thomas & Few, *supra* note 19; Goodale and Wickwire, *supra* note 19, 19 Plan Canada at 160; Wolpert, *supra* note 19; Knowles and Baba, The Social Impact of Group Homes (unpubl. report: Green Bay Wisc. Plan Comm'n 1973) *cited in* D. Lauber and F. Bangs, *supra* note 13 at 10.

market.[23] Indeed, some studies show enhanced values in some instances.[24]

In addition, a group home will not by itself cause any adverse change in the character of any neighborhood — single family residential or otherwise — in which it is located.[25] Inspections reveal that group homes are maintained at least as well if not better than surrounding homes, and that the homes are not conspicuous in their neighborhoods.[26] Neighborhood activity patterns do not change, *e.g.*, Knowles and Baba, *supra*, *cited in* D. Lauber and F. Bangs, *supra* note 13 at 10, and group homes do not cause any greater noise or traffic than do the other houses in the neighborhood. *Id.*

---

23 Collins and Broeneweg, *supra* note 19 (found adjacent houses stayed on market marginally longer); Wagner and Mitchell, *supra* note 19; (no difference) Goodale and Wickwire, *supra* note 19 (no difference).

24 Weiner, Anderson & Nietupski, *supra* note 19; Wagner and Mitchell, *supra* note 19; Knowles and Baba, *supra* note 22.

25 The placement of a single group home, as would occur in Cleburne, is widely recognized to cause no change in the character of a neighborhood. Over concentration of group homes, however, is to be avoided because it would not provide a "normal" environment for the residents. This was the express finding of the New York Legislature, *see* N.Y. Mental Hygiene Law § 41.34(c)(5), *see also* New York State Senate Mental Hygiene and Addiction Control Committee, Site Selection of Community Residences for the Mentally Disabled: Historical Perspective and Legislation 26-27 (April 1979), *cited in Crane Neck Assoc. v. NYC/Long Island County Services Group*, 61 N.Y.2d 154, 165, 460 N.Y.S.2d 69 (1984), *appeal dismissed and cert. denied*, ___ U.S. ___, 105 S. Ct. 60 (1984). *Accord* Hopperton, Zoning For Community Homes: Technical Assistance Handbook for Municipal Officials 5, 6, 9, 10 (unpubl. report: Ohio St. Univ. College of Law Dec. 1975); D. Lauber and F. Bangs, *supra* note 13 at 13-14; 23-24.

26 Weiner, Anderson & Nietupski, *supra* note 19, 17 Educ. and Training of the Mentally Retarded at 281; Dolan and Wolpert, *supra* note 19 at 12-13; Mambort, Thomas & Few, *supra* note 19; G. O'Connor, *supra* at 18. *Accord*, *J.T. Hobby and Sons Inc. v. Family Homes of Wake Co.*, *supra* note 18, 274 S.E.2d at 180 (group home is not significantly different from neighboring houses, except that its residents are mentally retarded); *State v. District Court*, 609 P.2d 245, 248 (Mont. 1980); *Group Home of Port Washington v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 273, 408 N.Y.S.2d 377 (1978); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305, 357 N.Y.S.2d 449 (1974).

F. Community Acceptance Of Group Homes Follows Their Establishment.

Finally, if *any* of these fears — of increased crime, falling property values, or change of neighborhood integrity — were at all valid, opposition to group homes would be expected to increase as those fears were realized. In short, "familiarity would breed contempt." Sigelman, Spahnel and Lorenzen, *supra*, note 13, 45 J. Rehabilitation at 54. However, the fears on which community opposition is based are merely "anticipatory, not experiential." Huey, *Placing the Mentally Retarded: Where Shall They Live?* 29 Hosp. and Community Psychiatry 596, 597 (1978). After group homes open whatever opposition may have been initially expressed fades after neighbors can see that their fears are unfounded. "Often, staff members reported that neighbors who at first were most strongly opposed to the home eventually became loyal friends." B. Baker, Seltzer & Seltzer, *supra* note 1 at 215.[27] In one nationwide study, 89 percent of the respondents reported community opposition had decreased after the group homes had opened. G. O'Connor, *supra* note 8 at 23. Another study concluded that "once mentally retarded resident had lived in a neighborhood, they tended to be accepted."

---

27 A similar transformation of a man who "led the opposition" to a community residence in his neighborhood was described as follows:

> Both plaintiffs and defendants agreed that such fear is best refuted by the community's experience with their retarded neighbors. Gary Shaw now regards his retarded neighbors as his friends; he visits them in their home, and they visit him in his. The property value in his neighborhood has increased. Moreover, Shaw works with other communities in Nassau and Suffolk who are resisting group homes. "I would tell the people, I know where you are coming from, I know what you are afraid of, I went through it, and you don't have to worry."

Society for Good Will to Retarded Children v. Cuomo, 572 F. Supp. 1300, 1340-41 (E.D.N.Y. 1983), *rev'd on other grds.*, 737 F.2d 1239 (2d Cir. 1984).

R. Mamula and N. Newman, *supra* note 7 at 60. Growing community acceptance as a result of familiarity — in place of opposition — also was the conclusion by researchers at Pennhurst and Willowbrook.[28]

In summary, the prejudice and fear underlying the action of the Cleburne City Council is contrary to the wide body of information concerning mentally retarded people who are already living in group homes, and to the specific evidence in the record concerning the proposed group home in Cleburne. Zoning decisions that enforce negative community attitudes are a serious threat to realization of the national and state public policies to provide community based residential and other services to mentally retarded people. If community based living arrangements do not exist in sufficient numbers or in appropriate locations, that national and state public policy cannot be effected. This Court must not allow that policy to be thwarted simply on the basis of unfounded desires by community residents that the group home be established "anywhere but here" or "but not on my block."

II. THE OSTENSIBLE PROTECTION OF MENTALLY RETARDED PERSONS ASSERTED BY PETITIONERS HAD NO RATIONAL BASIS AND WAS A PRETEXT FOR THE EXCLUSION OF THE GROUP HOME FROM THE AREA.

A. The City Council Had No Knowledge Of Needs Of Mentally Retarded Persons And No Standards For Protecting Them.

Those local governments that attempt to evade federal and state policy favoring integration of mentally retarded persons into the community often adopt pretextual arguments to justify their underlying purpose to exclude mentally retarded individuals from living in supervised settings in their community.

---

28 Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary 14 (unpubl. report: Temple Univ. Nov. 1983); D. Rothman and S. Rothman, The Willowbrook Wars: A Decade of Struggle for Social Justice 196 (1984).

Cleburne is no different in this respect. The District Court herein made it clear that exclusion of the mentally retarded was at the heart of the denial of the special use permit by the City Council. It found (J.A. 93, Finding of Fact 24):

> 24. If the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.

The District Court also found that the denial of the permit "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." (J.A. 94, Finding of Fact 29).

Nevertheless, petitioners continue to assert the same seven factors as below to justify their denial of the special use permit. *See* J.A. 95, Finding of Fact 34. Four of these "factors" are the expressions of irrational fears discussed above. The others are ostensible protections of the mentally retarded residents of the group home which are so far-fetched as to reveal their true exclusionary purpose. Even if the City Council had acted in good faith, its action is the kind of [d]iscrimination on the basis of handicap [that] . . . often occurs under the guise of a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons." *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981).

The City Council acted without any knowledge of the needs of mentally retarded individuals (T. 12-13; 36-37; 47) in an area already extensively regulated by federal and state governments. 42 C.F.R. § 442 *et seq.*; 40 T.A.C. § 27 *et seq.* The State of Texas, in its brief *amicus curiae* herein, has advised the Court that in Texas the authority to determine how the needs of mentally retarded citizens are to be met is a state function and not one of local zoning authorization. The Cleburne Zoning Ordinance (J.A. 49 *et seq.*) itself has no standards relating to homes for the mentally retarded. As applied by petitioners, the Ordinance leaves the City Council complete discretion to bar all group homes. As the Court of Appeals stated, such power is "too dangerous" because "[t]here is too great a potential for blanket

discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home." (J.A. 133, 726 F.2d at 201).[29] Moreover, as the Court of Appeals found, the City did not offer any evidence in support of its claims that it was protecting mentally retarded persons by the denial of the permit. (J.A. 134-36; 726 F.2d at 200-02).

B. The Ad-Hoc Classification Of The Group Home As A "Hospital For The "Feeble-Minded".

In order to have the authority to exclude the group home, the Cleburne City Council had to classify it as a "hospital" rather than as one of several other more logical categories which are permitted uses within District R-3, for example, a single family dwelling, boarding house or dormitory. In contrast, other communities seeking to exclude group homes for mentally retarded persons from zones for single family dwellings have classified them as boarding houses. *Compare, e.g., J.T. Hobby and Sons, Inc. v. Family Homes of Wake Co., supra* note 18, 274 S.E.2d at 179; *Costley v. Caromin House,* 313 N.W.2d 21, 25 (Minn. 1981); *Crowley v. Knapp,* 94 Wisc. 2d 42, 288 N.W.2d 815, 824 (1979), *with* Petitioners' Brief at 30 (quoting Cleburne Zoning Ordinance definition of boarding houses). The group home

---

29 The absence of standards or criteria in the zoning ordinance for securing a special use permit, in addition to being unacceptable to the Fifth Circuit, also is directly contrary to the recommendation of the American Society of Planning Officials.

> As with all special use permits, the zoning ordinance *should designate specific criteria* to guide the decision of the permit-granting agency. *Such criteria will increase the objectivity and lessen the influence of fear, prejudice, and political pressure on the decision making process.* This procedure permits the operator of a proposed facility to know in advance the conditions he must meet. . . .

D. Lauber and F. Bangs, *supra* note 13 at 23 (emphasis supplied). *See also* Hopperton, *supra* note 25 at 5 (conditions for issuance of permit should be specified in the ordinance).

herein is classified as a "hospital" even though no physicians or registered nurses will be employed at the home or be present on a regular basis (J.A. 93, Finding of Fact 23) and even though persons with significant medical needs are not eligible for residence under state regulations governing Level I ICF-MRs. 40 T.A.C. § 27.105(3); (T. 292).

The "hospital" classification also exemplifies the attitude of Cleburne toward its mentally retarded citizens. The Ordinance permits hospitals, sanitariums, nursing homes or homes for convalescents or aged of every nature, except for three — the insane, alcohol and drug addicts, and mentally retarded people (the "feeble-minded" in the words of the Zoning Ordinance), Section 8, No. 6 (J.A. 61).

The City also argues that the group home is a business, implying that its corporate status is relevant to its decision to exclude the group home. However,

> [R]esolution of the question of the nature of the usage of the property at issue does not turn upon the economic basis upon which the property is supported. That basis does not detract from the primary objective behind the operation of the facility and the essence of that operation: providing a non-institutional setting for normal human habitation and the activities incident thereto for mentally handicapped adults.

J.T. Hobby & Sons, Inc. v. Family Homes of Wake Co., supra note 18, 274 S.E.2d at 180. In addition, most permitted uses in the R-3 zone are businesses, and no rationale has been advanced to specially regulate the business of a group home as compared to any other business use.

C. The Pretext Of The Five Hundred Year Flood Plain.

The exclusion of the group home because it is located in an area where a flood may occur once in 500 years is a clear example of the pretextual nature of the City Council's action. The flood plain factor is not even considered for any other land use permitted in District R-3 or anywhere else in Cleburne. The City

has no general or specific flood plain planning requirement or regulation. The zoning ordinance does not even mention flood hazards or prohibit any uses because of flooding considerations. There is no evidence in the record that Cleburne had ever before considered a 500 year flood plain in reviewing a zoning application.

A variety of non-ambulatory individuals found in hospitals, sanitariums and nursing homes may live and be treated on the same site as that for the proposed group home, but the mentally retarded are excluded, even though, as the District Court found, all the residents would be "completely ambulatory." (J.A. 93, Finding of Fact 22). Federal and state regulations also require that residents of a Level I ICF-MR be ambulatory, 40 T.A.C. § 27.105(4); .2801; (T. 66) and capable of evacuating in case of emergency. *See* 42 C.F.R. §§ 442.505-506; 40 T.A.C. §§ 27.4601-4602; (T. 202).[30]

The group home "must have responsible staff members on duty and awake 24 hours a day to take prompt, appropriate action in the case of injury, illness, fire, or other emergency." 42 C.F.R. § 442.481(f); 40 T.A.C. § 3804(f). Both staff and residents are required to participate in evacuation drills at least four times per year, and on all shifts. 42 C.F.R. §§ 442.505-.506; 40 T.A.C. §§ 27.4601-.4602.

The irrationality of the City Council decision is made even more clear by comparing it to the extensive flood plain development regulations and restrictions issued by the federal government. Federal regulations do not require general flood hazard planning for land uses in a 500-year flood plain — the insignificant chance that a flood of that size would occur is considered too remote to warrant concern. *See* U.S. Water Resources Council, Flood Management Guidelines for Implementing Executive Order 11988, 43 Fed. Reg. 6030, 6043 (Feb. 10, 1978). The panel decision of the Fifth Circuit reached the same conclusion. (J.A. 136; 726 F.2d at 202). The bounds of the area to which federal

---

30 Petitioner's Brief, p. 30, erroneously states that a mentally retarded person is not eligible for an ICF-MR if he or she could not cope in an emergency.

flood hazard planning regulations apply is the 100-year flood plain. 43 Fed. Reg. 6032. The only exceptions for occupied structures that are considered are schools, nursing homes and hospitals, the very types of facilities that are expressly permitted by Cleburne at the same location as the group home. 43 Fed. Reg. 6043. *See also* J.A. 133; 726 F.2d at 201 (comparing risks of group home and nursing home residents).

Petitioners' application of the non-existent flood risk to the group home, coupled with their failure to apply that criteria to institutions with non-ambulatory patients and to other types of institutions specifically covered by federal regulations, evidences the irrational nature of petitioners' decision.

D. The Pretext Of Space And Density Concerns.

The court below found that "[t]he same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded." (J.A. 131-2, 726 F.2d at 200). *See also* J.A. 93, Finding of Fact 24. In response, Petitioners have asserted that their rejection of the group home at 201 Featherston is to protect the mentally retarded residents because of inadequacy of the size of the building and the lot. But as the record makes clear, the building and lot[31] meet every requirement ever imposed by the City of Cleburne under its zoning ordinance or any other city regulation. It also meets all applicable federal and state regulations in effect at the time the City Council rejected the application of respondent Cleburne Living Center. (J.A. 92, Finding of Fact 20).

Neither the Cleburne Zoning Ordinance or any other City ordinance prescribes minimum *per person* living space or recreation space, and, as the Fifth Circuit noted, the City has no occupancy limits for any permitted uses (J.A. 133, 726 F.2d at 201). Only in one setting, the single family home, is there any

---

31 The building has 2,700 square feet of living space and the lot size is 16,000 square feet. (J.A. 135, 726 F.2d at 202); (T. 72-73).

requirement as to the size of the structure, 650 square feet of living floor area *per family*, Zoning Ordinance, Section 6 (J.A. 57), yet this requirement does not apply to density of residents, the ostensible concern now asserted by the City. Even in a one family house, so long as the size exceeds 650 square feet, Cleburne imposes no restriction on the number of persons who may reside in the home.[32] Cleburne allows a nursing home, a fraternity house, a boarding house, an apartment house or apartment hotel to cram as many people into a building as the occupant wishes.

The same form of regulation exists as to the total lot area that must be provided for various residential land uses. Those regulations prescribe minimum lot sizes *per family*, regardless of the number of persons who would actually live there. *See* (J.A. 57) (R-1 zone, 7,000 square feet for one-family dwelling); (J.A. 58) (R-2 zone; same as for R-1 and 3,500 square feet for 2-family dwelling); (J.A. 62) (R-3 zone; same as for R-2 plus 1,500 square feet for multiple-family dwelling). The property at 201 Featherston meets all lot size requirements specified in the Cleburne Zoning Ordinance. The record does not contain any evidence that Cleburne has ever applied a resident density criterion in any prior zoning decision.

The statement in Petitioners' Brief, p. 27, that 201 Featherston St. "could not function as boarding house, a permitted use, for fifteen unrelated adult men and women" is not supported by the record citations offered by Petitioners, or by any evidence elsewhere in the record. The two citations, J.A. 46 and J.A. 82, refer only to the size of the premises and make no reference to the legality of its use as a boarding house. The statement in the

---

32 For example, Cleburne has no ordinance defining a "family" as a certain number of persons related by blood or marriage. Thus, the Cleburne ordinance is materially different from the ordinance reviewed in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), or *Macon Assoc. for Retarded Citizens v. Macon-Bibb Cty. Pl. & Zoning Comm'n*, 314 S.E.2d 218 (Ga. 1984), *appeal dismissed*, ___ U.S. ___, 105 S. Ct. 57 (1984).

same paragraph that density of residents may be regulated in some facilities by building codes and occupancy permits is equally unsupported by the citations and the record; the two citations in footnote 21 of Petitioners' Brief refer only to portions of the Zoning Ordinance, but that ordinance does not regulate resident density at all. Counsel for *amici* have been informed by Texas counsel that no ordinances or regulations exist in Cleburne which restrict the density of residents in a building.

Cleburne's assertion of power to regulate the density of residents within a group home is contrary to the position of the State of Texas that such regulation is the province of the State and not the City. *See amicus curiae* brief of State of Texas. Group homes for retarded persons are also regulated by comprehensive regulations of the State, 40 T.A.C. § 27 *et seq.*, and federal governments, 42 C.F.R. § 442 *et seq.* These regulations specify resident density in group homes, limiting occupancy to four persons per bedroom, and require sixty square feet of bedroom space per resident. 42 C.F.R. § 442.447; 40 T.A.C. § 27.3215. Cleburne lacks the power, and historically has never regulated, the operation of group homes, nursing homes, hospitals and the like; in such circumstances this Court has rejected the argument that the government entity was actually furthering an asserted government interest. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976).

The sudden interest on the part of Cleburne, Texas in "protecting" the mentally retarded is simply a case of discrimination against thirteen mentally retarded individuals who would live in a group home in Cleburne. The prejudice and the unfounded fear underlying this discrimination operate to exclude mentally retarded persons from housing, their most pressing need.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

KATHLEEN E. SURGALLA,
JUDITH SUBJECK
New York State Association
for Retarded Children, Inc.
Erie County Chapter
101 Oak Street
Buffalo, New York 14203
(716) 856-4201

JAMES R. SHELDON, JR.
Western New York Protection
and Advocacy Office for the
Developmentally Disabled
Neighborhood Legal
Services, Inc.
495 Ellicott Square Building
295 Main Street
Buffalo, New York 14203
(716) 847-0650

LEWIS GOLINKER
(Counsel of Record)
HERBERT SEMMEL
New York Lawyers for the
Public Interest, Inc.
36 West 44th Street
New York, New York 10036
(212) 575-5138

PETER MARGULIES
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2100

MURRAY LEVINE
Department of Psychology
SUNY at Buffalo
Buffalo, New York 14226
(716) 831-3091

Attorneys for *Amici Curiae*

APPENDIX A

Federal Statutes Promoting The Development Of Community-Based Residential Settings And Services For Mentally Retarded People

Developmental Disabilities Services and Facilities Construction Act of 1970, Pub L. No. 91-517, 84 Stat. 1376 (1970).

Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 *et seq.* (1976).

Education for all Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*

Housing Act of 1959, 12 U.S.C. § 1701q.

Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 210(b), 88 Stat. 633 (1974).

Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Pub. L. No. 88-156, 77 Stat. 275 (1963).

Mental Retardation Amendments of 1967, Pub. L. No. 90-170, 81 Stat. 527 (1967).

Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963).

Mental Retardation Facilities and Community Mental Health Centers Construction Acts Amendments of 1965, Pub. L. No. 89-105, 79 Stat. 427 (1965).

Omnibus Budget and Reconciliation Act of 1981, Pub. L. No. 97-35, 97 Stat. 357 (1981).

Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* 89-97, 79 Stat. 286 (1965).

Social Security Acts Amendments of 1974, codified at Social Security Act, Title XIX, 42 U.S.C. § 1367-1397f.

Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (1976).

Social Security Act, Title XIX, 42 U.S.C. § 1396d(c) and (d).

MOTION FILED
FEB - 1 1985

No. 84-468 (16)

Office - Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

VS.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND IN SUPPORT OF RESPONDENT

DISABILITY RIGHTS
EDUCATION & DEFENSE
FUND, INC.
ARLENE BRYNNE MAYERSON*
ROBERT J. FUNK
KIMBERLY SWAIN
2032 San Pablo Ave.
Berkeley, CA 94704
Telephone: (415) 644-2555

**Counsel of Record*

January, 1985

No. 84-468

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF CLEBURNE, TEXAS, et al.

Petitioners,

v.

CLEBURNE LIVING CENTER, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amicus respectfully moves this Court for an order granting leave to file a brief amicus curiae in this case pursuant to Rule 36 of the Supreme Court Rules. Consent of the attorneys for Respondent has been obtained. Consent of the attorneys for Petitioner has been refused.

Interest of Amicus Curiae

Disability Rights Education and Defense Fund (DREDF) is a national disability civil rights organization dedicated to securing equal citizenship for disabled Americans. Established in 1979, in the tradition of other legal defense funds representing other minorities and women, DREDF pursues its mission through education, advocacy and law reform efforts. From its inception, DREDF's primary purpose has been to include disability within the civil rights arena by demonstrating the connection between disability-based discrimination and discrimination based on race and gender. Critical to this effort has been the establishment of close working relationships with the NAACP Legal Defense Fund, Inc.[1], the

---

[1]DREDF and the NAACP Legal Defense Fund have worked together on two disability cases recently decided by this Court. Consolidated

Women's Legal Defense Fund and others representing disadvantaged and disenfranchised people. It is in this vain that the enclosed brief focuses on the close historical interrelationship between racial prejudice and stereotypes about retardation. The perspective presented in the brief is not presented by the respondent or other amici.

DREDF has a direct interest in this case. DREDF has represented and/or assisted hundreds of disabled people who have been excluded from opportunities because of the false and demeaning stereotypes present in this case. Furthermore, DREDF's efforts to promote the full integration of disabled citizens into the American mainstream would be wholly undermined if the type of exclusionary zoning present in this case were

---

Rail Corp. v. Darrone 465 U.S.--(1984); Choate v. Alexander, 53 U.S.L.W. 4072 (January 8, 1985)

allowed to stand. Hence, DREDF's clients will be directly affected by the outcome of this case.

For these reasons, this Motion For Leave to File a Brief as Amicus Curiae should be granted.

Respectfully submitted,

Arlene Brynne Mayerson

Arlene Brynne Mayerson
Counsel for Amicus Curiae

Dated: February 1, 1985

TABLE OF CONTENTS

Table of Authorities vi

Introduction/Summary of Argument 1

Argument 8

Prejudice Toward Retarded Persons is Similar to and Historically Interrelated with Racial Prejudice

Conclusion 20

TABLE OF AUTHORITIES

Cases

Buck v. Bell, 271 U.S. 200 (1927) 12

Bradwell v. State, 16 Wall 130 (1873) . . 1

Cleburn Living Center v. City 4
of Cleburne, 726 F.2d 191 (1984)

Larry P. v. Riles, 495 F. Supp. 926 . . . 19
(1979)

Plessy v. Ferguson, 163 U.S. 537 (1896) . 1

San Antonio Independent School 3
District v. Rodrigues, 411 U.S. 1 (1973)

United States v. Carolene Products, . . . 3
304 U.S. 144 (1938)

BOOKS AND PERIODICALS

Binet, Les Ildees modernes sur les enfants (1913) 9

Brigham, A Study of American Intelligence (1923) 17

Goddard, The Binet Tests in Relation to Immigration, Journal of Psycho-Asthenics (1913) . . . 14

Goffman, Stigma (1963) 4

Gould, Carrie Buck's Daughter, 93 Natural History 14 12

Kamin, The Science and Politics of I.Q. (1974) . . . . . passim

Kluger, Simple Justice (1976) . . 14, 18, 20

Terman, Feeble-Minded Children in the Public Schools of California, 5 Schools and Society, 165 (1917) . . 13

Terman, The Measurement of Intelligence (1916) 10, 13

Office of Civil Rights, Department of Education, Elementary and Secondary School Civil Rights Survey (1980) . . . 19

U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (1983) 8

INTRODUCTION/SUMMARY OF THE ARGUMENT

This case presents a challenge to deeply-rooted stereotypes and prejudices about retarded people. As was the case for blacks and women in Plessy v. Ferguson 163 U.S. 537 (1896) and Bradwell v. State, 16 Wall 130 (1873), the "self-evident" characteristics of mentally retarded people are being used by the city of Cleburn to justify exclusion and second-class citizenship.

In Plessy, the "nature of things" made it wholly implausible that the Fourteenth Amendment was intended to "abolish distinctions based on color" or "to enforce social ...equality, or a commingling of the two races upon terms unsatisfactory to either." 163 U.S. at 544 (emphasis added). In Bradwell it was the

"natural and proper timidity and delicacy which belongs to the female sex" which made the "idea of a woman adopting a distinct and independent career from that of her husband" "repugnant." 16 Wall at 141 (Bradley, J., concurring) (emphasis added). Fortunately, these opinions and their sex and race biased underpinning have been discredited. What was considered "self-evident" then about racial minorities and women is now generally considered deplorable. This Court has played a critical role in this evolution. It is this history and its recurrent present day manifestations which compel this Court to continue to scrutinize legislative classifications based on race or gender.

This case presents for the first time the proper role of the Court in reviewing classifications based on mental retardation. The history and present day status of

mentally retarded persons compels this Court to once again question the "self-evident". As the facts of this case demonstrate, to do otherwise would be to sanction the continuation of historical, deeply-rooted stereotypes and prejudices about retarded people. In Cleburn, Texas the "nature of things" is that people cannot live in the community because they are mentally retarded.

The facts of this case and the invalidity of the prevailing stereotypes utilized by the Cleburn City Council are fully addressed by respondent and other Amici. Likewise, the criteria set forth by this Court in United States v. Carolene Products, 304 U.S. 144, 152-53 n. 4 (1938) and San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 28 (1973) are shown to be present. The limited purpose of this brief is to raise suspicion about classifications based on retardation by

demonstrating the close historical interrelationship between demeaning and false stereotypes about retardation and racial prejudice.

Historically, retarded people have been considered sub-human. This characterization has been used to justify "unfair and often grotesque mistreatment," Cleburn Living Center v. City of Cleburne, 726 F.2d 191, 197 (1984). Critical to this justification is the assumption that the "sub-human" does not have the same feelings and reactions to the mistreatment as the "rest of us". Goffman, Stigma 5 (1963); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 81 (1983). Since retarded people are different from "the rest of us" in an identifiable way, stereotypes and prejudices are easily established and rarely questioned, particularly when

reinforced by "scientific" knowledge. Similar rationale has formed the foundation for racist ideology.

At the turn of the century in the United States the eugenics movement gained prominence in social, scientific and political thought. It was considered to be scientific fact that retardation was genetic, that is caused degeneracy, poverty and crime and that mentally retarded people were exceedingly sexual and needed to be segregated for life. These stereotypes were similar to prevailing stereotypes about blacks. Attributing the label of retardation to blacks provided a scientific shroud of respectability to existing prejudice and served to further justify unequal treatment. Likewise, when the influx of eastern Europeans became a political concern, the "discovery" that they were "feeble-minded" provided a scientific rationale for

exclusionary immigration policies.

It is painful to recount this period in American history. It is recounted here in order to show the abuse of classifications based on retardation and the deep historical roots of current day prejudice. The advances in the rights of retarded persons, set forth in the Government's brief, have not yet succeeded in transforming the public consciousness. To wait for this evolution is to needlessly condemn millions of retarded citizens to continued mistreatment. The neighbors in Cleburn petitioned the City Council to deny the permit in this case. They were fearful, but their fears were unfounded. Their action and that of the City Council represent the gap between public consciousness and current knowledge about retardation. It is precisely these times in history when the protective role of the Court is most important.

This case represents a cross-road in the history of millions of retarded citizens. The legacy of Plessy and Bradwell and the history recounted herein compels this Court to question the "self-evident" and to refuse to tolerate and perpetuate the remnants of this disgraceful era.

ARGUMENT

Prejudice Toward Retarded Persons is Similar to and Historically Interrelated with Racial Prejudice

At the turn of this century, the eugenics movement played a critical role in the development of public policy and public consciousness. Primary to the ideology of the eugenics movement was the belief that retardation was genetic and that the "feeble-minded" were the cause of societal instability. To insure against contamination of the general society, the leaders of this movement, prestigious psychologists and politicians, proclaimed the need for segregation for life and sterilization. With this fear and prejudice about mentally retarded persons firmly embedded in the public consciousness, the label of retardation provided a powerful weapon for racists. Through the "new science" of mental

testing, the scientists were able to "prove" the high rate of retardation among racial and ethnic minorities. Since the "feeble-minded" were seen as sub-human, attributing this characteristic to minorities served to affirm their fundamental difference as well. Hence, the mentally retarded label was used as yet another rationalization for mistreatment.

The original intelligence test was developed in France by Alfred Binet in 1905. Dr. Binet developed the tool as a diagnostic instrument and warned against the "brutal pessimism" of those who would use it as an indicator of innate intelligence.[2] However, the major translators of the Binet test in the U.S., Lewis Terman of Stanford, Henry Goddard at the Vineland Training School of New Jersey, and Robert Yerkes of Harvard,

---

[2]Kamin, The Science and Politics of I.Q. 5 (1974); citing A. Binet, Les Ildees modernes sur les enfants, 140-141 (1913).

were all members of various eugenic societies and organizations. From the time of the introduction of the Americanized "Stanford-Binet" test by Terman in 1916, the intermingling of stereotypes about racial minorities and the "feeble-minded" was predominent[3]. In his 1916 publication, The Measurement of Intelligence, 6-7, Dr. Terman made his purpose explicit:

> ...in the near future intelligence tests will bring tens of thousands of these high-grade defectives under the surveillance

---

[3]It is important to note at the outset that although the I.Q. test played a particularly pernicious role in the history recounted herein, it is not the I.Q. test per se which is the focus of this examination. Rather, it is the fact that the stigma of retardation was applied to already stimatized groups that is significant here. The virulent use of the label to racial and ethnic minorities demonstrates racial prejudice. Likewise, the fact that it was considered such an effective tool by racists demonstrates the stigma attached to retardation. Sub-human status is the common theme.

> and protection of society. This will ultimately result in curtailing the reproduction of feeble- mindedness and in the elimination of an enormous amount of crime, pauperism, and industrial inefficiency. It is hardly necessary to emphasize that the high-grade cases, of the type now so frequently overlooked, are precisely the ones whose guardianship it is most important for the State to assume.

In Terman's view "high- grade defectives" were:

> very, very common among Spanish-Indian and Mexican families of the Southwest and also among negroes. Their dullness seems to be racial, or at least inherent in the family stocks from which they come.
>
> Children of this group should be segregated in special classes...There is no possibility at present of convincing society that they should not be allowed to reproduce, although from a eugenic point of view they constitute a grave problem because of their unusually prolific breeding. Id. at 91-92.[4]

---

[4]Just eleven years later the U.S.

In 1917, Terman wrote, under the heading "The Menace of Feeble-Mindedness";

> only recently have we begun to recognize how serious a menace it is to the social, economic and moral welfare of the state....It is responsible...for the majority of cases of chronic and semi-chronic pauperism....
>
> ...the feeble-minded continue to multiply...organized charities...often contribute to the survival of individuals who would otherwise not be able to live and reproduce...
>
> If we would preserve our state for a class of people worthy to possess it, we must prevent, as far as possible, the propagation of

---

Supreme Court upheld the Virginia sterilization law in Buck v. Bell, 271 U.S. 200 (1927). A recent study has revealed that not only was Carrie Buck, the woman who was sterilized, not mentally retarded, but her daughter prior to sterilization was also not retarded. Rather, Carrie Buck was poor and illegitimate, as was her daughter. Justice Holme's infamous statement about "three generations of imbeciles are enough," Id. at 207, was unfounded. Gould, Carrier Buck's Daughter, 93 Natural History 14-18 (July, 1984).

> mental degenerates...curtailing the increasing spawn of degeneracy.[5]

The expediency of using the public fear and prejudice about retarded people to subjugate racial and ethnic minorities is also evident in the politics of immigration at the turn of the century. The wave of immigration from eastern Europe aroused a public clamor for some form of "quality control" over the inflow of immigrants.[6] The new "science" of mental testing was used to reinforce existing prejudices.

In 1912, Henry Goddard was invited by the U.S. Public Health Service to Ellis Island to determine the extent of the "feeble- minded menace" among the new immigrants. The test results established that 83% of the Jews, 80% of the Hungarians,

---

[5]L. M. Terman, Feeble-Minded Children in The Public Schools of California, 5 Schools and Society, 165 (1917).

[6]Kamin, supra, at 16.

79% of the Italians, and 87% of the Russians were "feeble-minded." H. H. Goddard, The Binet Tests in Relation to Immigration, Journal of Psycho-Asthenics, (1913).

The eugenics "scientists" became increasingly involved in politics during the early formulation of immigration policies in the 1920's. The secretary of the Eugenics Research Association, Harry Laughlin, was appointed "Expert Eugenics Agent" of the House Committee on Immigration and Naturalization of the U.S. Congress. The chairman of the Eugenics Research Association was also the chairman of the House Committee on Immigration and Naturalization, Albert Johnson.[7]

---

[7]Kamin, supra, at 19. The eugenics philosophy was also voiced by other prominent political figures. For example, Vice President Coolidge wrote in 1922 that the laws of biology had demonstrated that Nordic people deteriorate when mixed with other races. Kluger, Simple Justice 307 (1976).

The National Research Council established a Committee on Scientific Problems of Human Migration, under the leadership of Robert Yerkes[8], to provide "scientific" information to Congress on the innate characteristics of classes of immigrants. In the first research of the National Research Council's committee, by Professor Brigham of Princeton, a new scientific discovery was unveiled. The intelligence of immigrants was related to the number of years that they had lived in America. Those who had lived in the country for five years or less were essentially feeble-minded. From this its author concluded that "we are forced to...accept the

---

[8]Yerkes led a major testing study of draftees during World War I. The results which were published by the National Academy of Sciences under Yerkes editorship first announced the inferior intelligence of blacks, along with immigrants from Latin or Slavic countries. Kamin, supra, at 18-19.

hypothesis that the curve indicates a gradual deterioration in the class of immigrants...who came to this country in each succeeding five year period since 1902."[9] From this Professor Brigham provides a clarifying explanation--"the race hypothesis."

> The Nordics are...rulers, organizers, and aristocrats...individualistic, self-reliant, and jealous of their personal freedom...as a result they are usually Protestants....The Alpine race is always and everywhere a race of peasants....The Alpine is the perfect slave, the ideal serf...the unstable temperament and the lack of coordinating and reasoning power so often found among the Irish....we have no separate intelligence distribution for the Jews....our army sample of immigrants from Russia is at least one half Jewish....Our figures, then, would rather tend to disprove the popular belief that the Jew is intelligent...he has the head form, stature, and color of his Slavic neighbors. He is an Alpine Slav.

---

[9] Id. at 21.

C. Brigham, A Study of American Intelligence, 182-3, 195, 189, 190 (1923).

Finally, Dr. Brigham warned:

> We must face a possibility of racial admixture here that is infinitely worse than that faced by any European country today, for we are incorporating the negro into our racial stock, while all of Europe is comparatively free from this taint....The decline of American intelligence will be more rapid than the decline of the intelligence of European national groups, owing to the presence here of the negro. Id. at 210.[10]

The critical role of the eugenics movement continued throughout the Congressional hearings leading up to the

---

[10]Lest it be assumed that Professor Brigham's work was disavowed by his colleagues, the 1923 Journal of Educational Psychology stated "The thesis is carefully worked up...we certainly shall be in hearty agreement with him when he demands a more selective policy for future immigration and a more vigorous method of dealing with the defective strains already in this country." Kamin at 22 citing, 4 Journal of Educational Psychology 184-185 (1923).

Immigration Act of 1924.[11] It is no coincidence that during this same period of time anti-black feeling in America was at its zenith and that the findings of the "scientists" that blacks were more likely to be "feeble-minded" was also used to justify racial segregation.[12]

---

[11] Hearings before the Committee on Immigration and Naturalization, House of Representatives, January 3, 4, 5, 22, and 24, 1923 at 589-594; Hearings before the Committee on Immigration and Naturalization, House of Representatives, December 26, 27, and 31, 1923, and January 2, 3, 4, 5, 7, 8, 10 and 19, 1924, at 837; Hearings before the Committee on Immigration and Naturalization, House of Representatives, March 8, 1924, at 1231-1284. See also, Kamin, supra at 19-26. "The Johnson-Lodge Immigration Act of 1924 established national origin quotas as a permanent aspect of immigration policy...; but most important, the quotas were to be based on the census of 1890. The use of the 1890 census had only one purpose.... The "New Immigration" had begun after 1890, and the law was designed to exclude the biologically inferior...." Id. at 27.

[12] See generally, Kluger, Simple Justice 306-314 (1976).

The dramatic overrepresentation of blacks in classes for the mentally retarded

The fervor of the reaction to the "findings" of the high rate of retardation in the non-Nordic races was fueled by and dependant on the assumption throughout that the "feeble-minded" were less than fully human and were the primary cause of society's ills--pauperism, crime, sex offenses and dependency.

---

also testifies to the continuing influence of this era on the present day status of minorities. Office of Civil Rights, Department of Education, Elementary and Secondary School Civil Rights Survey (1980). As stated by Judge Peckam in Larry P. v. Riles, 495 F. Supp. 926,935 (1979):

> We must recognize at the outset that the history of the I.Q. test, and of [segregated] education classes built on I.Q. testing, is not the history of neutral scientific discoveries translated into educational reform. It is, at least in the early years, a history of racial prejudice, of Social Darwinism, and of the use of the scientific "mystique" to legitimate such prejudices.

CONCLUSION

The underpinnings of the eugenic influenced immigration policies, the officially sanctioned segregation of Plessy v. Ferguson and the segregation and sterilization of the mentally retarded are closely related. Each is reliant on public stereotypes, reinforced by sociological and scientific trends, and each has as its objective the maintenance of majoritarian power and prestige, at the expense of the minority. Perhaps most alarming is the fact that each stereotype is considered "self-evident" at the time.

As stated by Richard Kluger in Simple Justice 305 (1976):

> ....Had the Plessy Court chosen candidly to declare the prevailing view of the day among white Americans of every station, it would have said that no badge was necessary to proclaim what was self-evident. Keeping blacks

> separate, everyone understood, would prevent contamination of white blood by the defective genes of colored people, whose unfortunate traits stemmed from their tribal origins in densest Africa and were incurably fixed upon the race from generation unto generation. Why speak of "badges of inferiority" when their very blackness bespoke their low and brutish nature?

The intermingling of stereotypes about racial and ethnic minorities and those about the mentally retarded compels the need to scrutinize classifications on the basis of mental retardation. The lesson is clear that prevailing attitudes reflected in legislative choices cannot be given deference in light of this history. If nothing else, at least we have demonstrated that "self-evident" truths about historically despised people must be questioned. The scrutinizing role of the judiciary is critical to preserve the fundamental principles of equality and justice.

For the foregoing reasons, Amicus respectfully submits that the Court should affirm the decision below.

Respectfully submitted,

Arlene Brynne Mayerson

By Arlene Brynne Mayerson*
Robert J. Funk

*Counsel of Record

MOTION FILED
FEB 1 1985

No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, et al.,

Petitioners,

—v.—

CLEBURNE LIVING CENTER, et al.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES FOUNDATION OF TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PAUL HOFFMAN
STANLEY FLEISHMAN
JOSEPH LAWRENCE
JAMES PREIS
American Civil Liberties Union Foundation of Southern California
633 South Shatto Place
Los Angeles, California 90005
(213) 487-1720

BURT NEUBORNE
(Counsel of Record)
CHARLES S. SIMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JAMES C. HARRINGTON
American Civil Liberties Foundation of Texas
600 West 7th Street
Austin, Texas 78701
(512) 477-5849

ROBERT M. LEVY
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

February 2, 1985

**MOTION OF THE
AMERICAN CIVIL LIBERTIES UNION,
THE NEW YORK CIVIL LIBERTIES UNION,
THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF SOUTHERN CALIFORNIA
AND THE AMERICAN CIVIL LIBERTIES
FOUNDATION OF TEXAS
FOR LEAVE TO FILE A BRIEF
AMICI CURIAE IN SUPPORT OF RESPONDENT**

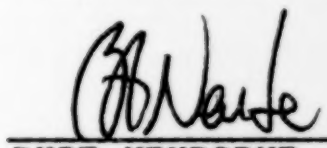
The American Civil Liberties Union, the New York Civil Liberties Union, the American Civil Liberties Union Foundation of Southern California and the American Civil Liberties Foundation of Texas respectfully move for leave to file the attached brief amici curiae in support of Respondent Cleburne Living Center, Inc.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 members dedicated to the protection of civil rights and civil liberties. The New York Civil Liberties Union, the ACLU of Southern California, and the American Civil Liberties Foundation of Texas are state affiliates of the ACLU.

The ACLU and its state affiliates have long worked to uphold the rights of disadvantaged groups under the equal protection clause of the Fourteenth Amendment. The ACLU has also frequently asserted the federal statutory and constitutional rights of handicapped persons. The ACLU believes that this case presents the Court with an important opportunity to clarify the rights of mentally retarded persons.

Respondents have consented to the filing of this brief amici curiae. However, the petitioners have declined to grant consent.

Respectfully submitted,



BURT NEUBORNE
(Counsel of Record)
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
212/944-9800

(list of counsel continued)

ROBERT M. LEVY
New York Civil Liberties
Union
132 West 43rd Street
New York, New York 10036
212/382-0557

PAUL HOFFMAN
STANLEY FLEISHMAN
JOSEPH LAWRENCE
JAMES PREIS
American Civil Liberties
Union Foundation of
Southern California
633 South Shatto Place
Los Angeles, California 90005
213/487-1720

JAMES C. HARRINGTON
American Civil Liberties
Foundation of Texas
600 West 7th Street
Austin, Texas 78701
512/477-5849

Dated:
New York, New York
January 31, 1985

TABLE OF CONTENTS

Pages

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.....i

TABLE OF AUTHORITIES.....vii

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....13

ARGUMENT.....22

I. Cleburne's Zoning Ordinance and Decision to Deny the Special Use Permit Excludes Mentally Retarded Persons from the City and from City Programs and Activities Receiving Federal Revenue Sharing Funds, Thus Violating the Anti-Discrimination Provisions of the Revenue Sharing Act.....22

A. The Revenue Sharing Act Protects Handicapped Persons Against Discrimination By Recipient Program or Activities.....23

B. The Program-Specific Limits on the Reach of the Anti-Discrimination Provisions of the Revenue Sharing Act and § 504 of the Rehabilitation Act Do Not Bar an Action on Behalf of Handicapped Persons Who Have Been Zoned Out of a City Whose Programs or Activities Receive Federal Revenue Sharing Funds.....26

C. The City Has Effectively Excluded Mentally Retarded Persons.....32

II. Cleburne's Zoning Procedure Violates Procedural Due Process of Law Because It Requires a Vulnerable Minority to Secure a Wholly Discretionary Permit, the Issuance of Which is Largely Dependent on the Acquiescence of Neighboring Property Owners in Order to Establish an Otherwise Qualified Group Home for the Mentally Retarded.....37

III. Cleburne's Refusal to Grant Permission to Establish a Group Home for the Mentally Retarded Violates the Equal Protection Clause Because (A) It Was Based on Stereotypical Fears Concerning Mental Retardation, and (B) It Is Not Supported By A Substantial Justification.....46

A. Cleburne's Resort to Stereotypical Thinking.....46

B. The Relevance of Heightened Scrutiny.....52

CONCLUSION.....59

TABLE OF AUTHORITIES

Cases

Addington v. Texas,
441 U.S. 418 (1979).....47

Alexander v. Choate,
53 U.S.L.W. 4072
(U.S. Jan. 9, 1985).....37

Ashwander v. Tennessee Valley
Authority,
297 U.S. 288 (1936).....22

Baxstrom v. Herold,
383 U.S. 107 (1966).....44

Belle Terre v. Boraas,
416 U.S. 1 (1974).....51

Board of License Commissioners
v. Pastore,
53 U.S.L.W. 4057
(U.S. Jan. 8, 1985).....58

Bob Jones University
v. Johnson,
396 F. Supp. 597
(D.S.C. 1974),
aff'd mem.,
529 F.2d 514
(4th Cir. 1975).....31

Brown v. Sibley,
650 F.2d 760
(5th Cir. 1981).....30

Buchanan v. Warley,
245 U.S. 60 (1917).....51

Cannon v. University
of Chicago,
441 U.S. 677 (1979).....16, 27

Cantwell v. Connecticut,
310 U.S. 296 (1940).....39

Cleveland Board of
Education v. LaFleur,
414 U.S. 632 (1974).....50

Eastlake v. Forest City
Enterprises,
426 U.S. 668 (1976).....45

Eubank v. Richmond,
226 U.S. 137 (1912).....43

Grayned v. City of Rockford,
408 U.S. 104 (1972).....38

Grove City College v. Bell,
79 L.Ed.2d 516 (1984).....27, 28

Grove City College v. Harris,
500 F. Supp. 253
(W.D. Pa. 1980),
rev'd, 687 F.2d 684
(3d Cir. 1982),
aff'd, 79 L..Ed.2d 516 (1984).....29

Haffer v. Temple University,
524 F. Supp. 531
(E.D. Pa. 1981),
aff'd and remanded per curiam,
688 F.2d 14 (3d Cir. 1982).....31

Hillsdale College v. HEW,
696 F.2d 418
(6th Cir. 1982).....30

Holmes v. New York City
Housing Authority,
398 F.2d 262
(2d Cir. 1968).....40

Hornsby v. Allen,
326 F.2d 605
(5th Cir. 1964),
on petition for rehearing,
330 F.2d 55
(5th Cir. 1964)
(per curiam).....40

Hunter v. Erickson,
393 U.S. 385 (1969).....45

Hynes v. Mayor of Oradell,
425 U.S. 610 (1976).....17, 39

Iron Arrow Honor Society
v. Heckler,
702 F.2d 549
(5th Cir.),
vacated and remanded as moot,
78 L.Ed.2d 58 (1983).....30

Jackson v. Indiana,
406 U.S. 715 (1972).....49

James v. Strange,
407 U.S. 128 (1972).....49

James v. Valtierra
402 U.S. 137 (1971).....45

Jimenez v. Weinberger,
417 U.S. 628 (1974).....50

Johnson v. City of Arcadia,
450 F. Supp. 1363
(D. Fla 1978).....36

Kolender v. Lawson,
461 U.S. 352 (1983).....17, 37, 40

Korematsu v. United States,
323 U.S. 214 (1944).....52

Kunz v. New York,
340 U.S. 290 (1951).....39

Langnes v. Green,
282 U.S. 531 (1931).....25

Largent v. Texas,
318 U.S. 418 (1943).....39

Larkin v. Grendel's Den,
459 U.S. 116 (1982).....44

Lau v. Nichols,
414 U.S. 563 (1974).....35

Lovell v. Griffin,
303 U.S. 444 (1938).....38

Moore v. Village of
East Cleveland,
431 U.S. 494 (1977).....51, 56, 57

Morton v. Ruiz,
415 U.S. 199 (1974).....40

New York State Ass'n for
Retarded Children v. Carey,
706 F.2d 956
(2nd Cir. 1983).....2

New York State Ass'n for
Retarded Children v. Rockefeller,
357 F. Supp. 752 (E.D.N.Y. 1973).....2

Niemotko v. Maryland,
340 U.S. 268 (1951).....39

Othen v. Ann Arbor School Board,
507 F. Supp. 1376
(E.D. Mich. 1981),
aff'd,
699 F.2d 309
(6th Cir. 1983).....31

Palmore v. Sidoti,
80 L.Ed.2d 421 (1984).....19, 46

Papachristou v. City
of Jacksonville,
405 U.S. 156 (1972).....38, 39

Pennhurst State School and
Hosp. v. Halderman,
104 S. Ct. 900 (1984).....3

Plyler v. Doe,
457 U.S. 202 (1982).....52

Reed v. Reed,
404 U.S. 71 (1971).....19, 46

Reitman v. Mulkey,
387 U.S. 369 (1967).....45

Rice v. President & Fellows
of Harvard College,
663 F.2d 336
(1st Cir. 1981).....30

Rinaldi v. Yeager,
384 U.S. 305 (1966).....49

Santosky v. Kramer,
455 U.S. 745 (1982).....47

Schneider v. State,
308 U.S. 147 (1939).....39

Shuttlesworth v. Birmingham,
394 U.S. 147 (1969).....39, 40

Skinner v. Oklahoma,
316 U.S. 535 (1942).....9

Smith v. Goguen,
415 U.S. 566 (1974).....39

Southeastern Community College
v. Davis,
442 U.S. 397 (1979).....33, 37

Staub v. City of Baxley,
355 U.S. 313 (1958).....39

Stewart v. New York University,
430 F. Supp. 1305
(S.D.N.Y. 1976).....32

Thomas v. Collins,
323 U.S. 516 (1945).....39

Thornhill v. Alabama,
310 U.S. 88 (1940).....39

United States v. Arthur
Young & Co.,
79 L.Ed.2d 826 (1984).....25

United States v. Carolene
Products Co.,
304 U.S. 144 (1938).....52

United States Department
of Agriculture v. Moreno,
413 U.S. 528 (1973).....49

United States Department
of Agriculture v. Murry,
413 U.S. 508 (1973).....50

University of Richmond
v. Bell,
543 F. Supp. 321
(E.D. Va. 1982).....30

Village of Hoffman Estates v.
Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982).....38

Vitek v. Jones,
445 U.S. 480 (1980).....7, 41, 57

Washington ex rel. Seattle
Trust Co. v. Roberge,
278 U.S. 116 (1928).....17, 43

Wyatt v. Stickney,
344 F. Supp. 373
(M.D. Ala.),
344 F. Supp. 387
(M.D. Ala. 1972),
aff'd sub nom
Wyatt v. Aderholt,
503 F.2d 1305
(5th Cir. 1974).....3

Youngberg v. Romeo,
457 U.S. 307 (1983).....3

Statutes

Title VI of the
Civil Rights Act of 1964,
42 U.S.C. §§ 2000d to 2000d-4.....29, 36

Section 504 of the Rehabilitation
Act of 1973, (29 U.S. § 794).....passim

Title IX of the Education
Amendments of 1972
20 U.S.C. §§ 1681-86.....passim

31 U.S.C. § 6716(b)(2) (1984).....27, 29

Other authorities

Gould, The Mismeasure of Man (1981).....12

Heal, Sigelman and Switsky, Research on Community Alternatives For the Mentally Retarded, 9 Int. Rev. of Research in Mental Retardation (2d ed. 1978).....4

Herr, Rights and Advocacy For Retarded People (1983).....1, 8, 10, 11

Keith and Ferdinand, Changes in Levels of Mental Retardation: A Comparison of Institutional and Community Populations, 9 TASH Journal (1984).....4, 5

Kindergran, Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States, 43 Chi.-Kent L. Rev. (1966).....8, 9

King, Raynes and Tezarel, Patterns of Residential Care: Sociological Studies in Institutions for Handicapped Children (1971).....4

Linn & Bowers, The Historical Fallacies Behind Legal Prohibitions Of Marriages Involving Mentally Retarded Persons -- The Eternal Child Grows Up, 13 Gonzaga L.Rev. 625 (1978).....8

Mercer, Labeling the Mentally Retarded (1976).....12

12 Moore's Federal Practice ¶ 400.04-4 (1982).....25

Note, Mental Disability and the Right to Vote, 88 Yale L.J. (1979).....8

Note, A Sterilization Statute for Kentucky, 23 Ky. L.J. 168 (1934).....9

Phillips and Balthegar, Some Correlates of Language Determination in Severely and Profoundly Retarded Long-Term Institutionalized Residents, 83 Amer. J. of Mental Deficiency (1979).....4

Scheerenberger, Public Residential Services for the Mentally Retarded, 1982 (1983).....6

Schroedal, Attitudes Towards Persons with Disabilities: A Compendium of Related Literature (1979).....11

Shaman, Persons Who Are Mentally Retarded: Their Right to Marry and Have Children, 12 Fam. L.Q. 61 (1978).....8

Silverstein, Changes in the Measured Intelligence of Retardates as a Function of Hospital Age, 1 Developmental Psychology (1969).....4

Social & Psychological Aspects of Disability (Stubbin ed. 1977).....11

Switsky, Research on Community Alternatives for the Mentally Retarded, 9 Int'l Rev. of Research in Mental Retardation 209 (2d ed. 1978).....4

Tringo, The Hierarchy of Preference Toward Disability Groups, 4 Journal of Spec. Educ. 295-305 (1970).....12

United States Civil Rights Commission, Accommodating the Spectrum of Individual Abilities (1983).....6, 12

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the decision below. In addition to these specific facts, however, the following factual material is necessary for a full understanding of the issues presented.

A. Access To Adequate Group Housing Is Critically Important To Mentally Retarded Persons.

There are more than two million mentally retarded persons in America. Herr, Rights and Advocacy For Retarded People 3 (1983). For many of these individuals, the availability of group living arrangements similar to the group home at issue in this case offers the only alternative to life-long confinement in large and dehumanizing institutions. Jt. App. 33-34; 94 (Trial Finding of Fact No. 30).

Historically, institutions have isolated mentally retarded persons in remote, stigmatizing settings, Jt. App. 95 (Trial Finding

of Fact No. 32), which typically failed to afford minimally adequate care and treatment and on numerous occasions subjected residents to unspeakable conditions of physical squalor. During the last decade, litigation brought by parents and relatives of mentally retarded inmates at facilities in seventeen states has revealed widespread instances of physical and educational neglect. In many cases residents were naked or partially clothed; were warehoused in filthy and unsanitary environments; suffered a disproportionate number of serious injuries and major diseases; experienced an extraordinarily high mortality rate; and received little or no medical care or habilitative treatment. See, e.g., New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 961-962 (2d Cir. 1983); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (Willowbrook); Wyatt v.

Stickney, 344 F. Supp. 373 (M.D. Ala.), 344 F. Supp. 387 (M.D. Ala. 1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (Partlow State Hospital); Pennhurst State School and Hosp. v. Halderman, 104 S. Ct. 900 (1984).

Even in those public facilities where living conditions are less brutal, constraints on money and resources all too often make overcrowding and understaffing an inevitable fact of institutional life, as this Court has noted. Youngberg v. Romeo, 457 U.S. 307, 324 (1983). Consequently, many mentally retarded persons live out their lives in settings which are at best custodial. The barren and unstimulating environment at most state institutions impedes the growth and development of basic living skills. Indeed, it is well established that institutionalized persons frequently lose skills that they had mastered prior to admis-

sion.[1] Studies of the effects of prolonged institutionalization on mentally retarded people have documented, inter alia, declines in longitudinal I.Q.,[2] communication skills[3] and overall functioning levels.[4] Comparisons among persons with similar clinical characteristics in institutional and community settings indicate that residents of community homes are more likely to increase their functioning level, whereas institutionalized

---

[1] King, Raynes and Tezarel, Patterns of Residential Care: Sociological Studies in Institutions for Handicapped Children (1971); Heal, Sigelman and Switsky, Research on Community Alternatives For the Mentally Retarded, 9 Int'l Rev. of Research in Mental Retardation 209, 243 (2d ed. 1978).

[2] Silverstein, Changes in the Measured Intelligence of Retardates as a Function of Hospital Age, 1 Developmental Psychology 125-27 (1969).

[3] Phillips and Balthegar, Some Correlates of Language Determination in Severely and Profoundly Retarded Long-Term Institutionalized Residents, 83 Amer. J. of Mental Deficiency 402-08 (1979).

[4] Keith and Ferdinand, Changes in Levels of Mental Retardation: A Comparison of Institutional and Community Populations, 9 TASH Journal 26-30 (1984).

persons are more likely to regress at a higher rate. Keith and Ferdinand, supra note 4. For many people, life after institutionalization begins in the group home. The Cleburne Living Center, for example, was intentionally placed near a park, a school and a shopping area so that its residents would have full access to the community at large.

In response to the acknowledged deficiencies and high cost of institutions, most states, including Texas, have adopted policies which promote deinstitutionalization and encourage the development of group housing for mentally retarded persons. See brief amicus curiae of the State of Texas. Thus, between 1971 and 1982, the number of state institutions for retarded people decreased by 34 percent from 279 to 182, and the number of institutionalized residents dropped from 189,546 to 119,335.[5]

However, the process of deinstitutionalization depends upon the ability to establish community residences. Where group housing is unavailable, deinstitutionalized persons have found themselves among the homeless and impoverished, frequently the victims of crime or the residents of substandard nursing homes or rundown hotels.[6] Access to group housing is critically important to the efforts of mentally retarded persons to break the cycle of institutionalization and become participants in "normal" community life. Without it, mentally retarded people will have little meaningful opportunity to engage in "the pursuit of happiness."

It is, therefore, no exaggeration to characterize the interest at stake in this

---

[6] See United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 35 (1983).

[cont'd. on next pg]

case as a critical "liberty" interest in the most traditional sense of the word. At stake is the difference between life in an impersonal and understaffed institution with the attendant restrictions on physical mobility, and personal fulfillment and a relatively normal life in a residential setting. Indeed, for the mentally retarded, the differences between the quality of life in an institutional setting and life in a group home setting is far greater than the difference between confinement in a prison and commitment to a mental hospital which was found sufficient to warrant full "liberty" protection in Vitek v. Jones, 445 U.S. 480 (1980).

B. Mentally Retarded Persons Have Been The Victims of Irrational Prejudice And Are Uniquely Unable To Protect Themselves By Resort To The Political Process.

Throughout history, mentally retarded persons have been the victims of irrational stereotypes and prejudices and have been

subjected to inhumane and discriminatory practices. In America, the mentally retarded have been segregated,[7] sterilized,[8] forbidden to marry or procreate,[9] and effectively excluded from the political process.[10] Despite the recent enactment of certain protective legislation, deeply rooted prejudices are still reflected in invidious governmental actions, such as the refusal to permit the establishment of a group home for mentally retarded adults in this case.

Although this Court has declared that

---

[7] Herr, supra page 1, at 21-27.

[8] Kindergran, Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States, 43 Chi.-Kent L. Rev. 123, 139 (1966).

[9] Linn & Bowers, The Historical Fallacies Behind Legal Prohibitions Of Marriages Involving Mentally Retarded Persons -- The Eternal Child Grows Up, 13 Gonzaga L. Rev. 625 (1978); Shaman, Persons Who Are Mentally Retarded: Their Right to Marry and Have Children, 12 Fam. L. Q. 61 (1978).

[10] Note, Mental Disability and the Right to Vote, 88 Yale L. J. 1644 (1979).

marriage and procreation are "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), mentally retarded persons have been a primary target of sterilization laws and have consistently been prevented from marrying. During the first third of this century, eugenic sterilization laws[11] were enacted to prevent mentally retarded persons from producing "degenerate offspring." Thirty-one states passed laws which

---

[11] The reasoning behind these statutes is expressed in the opening paragraph of a 1934 law review note:

> Since time immemorial, the criminal and defective have been the "cancer of society." Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feebleminded, epileptic, insane, criminal, diseased and others.

Note, A Sterilization Statute for Kentucky, 23 Ky. L.J. 168 (1934). The premises underlying eugenic sterilization, however, have been thoroughly discredited. See, e.g., Kindergran, supra note 8, at 139.

resulted in the involuntary sterilization of more than 70,000 mentally retarded Americans.[12] A recent United States Civil Rights Commission survey noted that fifteen states still authorize compulsory sterilization of mentally retarded or mentally ill individuals.[13] Similarly, a majority of states have passed laws proscribing marriage where one of the parties is mentally retarded.

To supplement eugenic sterilization laws, states also enacted eugenic segregation measures which created institutions designed to protect normal citizens from the transmission of mental defects. Indeed, mentally retarded children who were not confined in institutions were, until recently, systemati-

---

[12] Herr, supra page 1, at 27 (citing N. Kittrie, The Right to be Different: Deviance and Enforced Therapy 325 (1971)).

[13] United States Civil Rights Commission, Accommodating The Spectrum of Individual Abilities 36-37 (1983).

cally excluded from the public school system as another protection against "incompetence." According to estimates of the United States Office of Education, as recently as 1974 1.75 million school children -- nearly half of whom had been properly or improperly classified as mentally retarded -- were barred from the public schools.[14]

Years of segregation have caused and maintained widespread prejudice, fear and ignorance concerning mentally retarded people. Stereotypes of the retarded as dangerous, sexually promiscuous or deviant, mentally ill and incompetent are still commonplace.[15] None of the three city council mem-

---

[14] Herr, supra page 1, at 3 (citing Children's Defense Fund, Children Out of School (1974)).

[15] See generally Social and Psychological Aspects of Disability (Stubbins ed. (1977)); Schroedel, Attitudes Towards Persons with Disabilities: A Compendium of Related Literature (1979); Mercer, Labeling the Mentally Retarded (1976); Tringo, The Hierarchy of Preference Toward Disability Groups, 4 Journal of Spec. Educ. 295-305 (1970).

Even technical terms once used to describe

[cont'd. on next pg]

bers who denied respondent's application for a special use permit knew what mental retardation was. Indeed, two council members thought it was a kind of mental illness or instability. Jt. App. 26, 27, 30.

Finally, the exclusion of mentally retarded persons from the political process renders them virtually powerless to influence majoritarian decisionmaking. As recently as 1979, most states categorically denied mentally retarded persons the right to vote.

This case, therefore combines a critically important liberty interest and a clear inability of the mentally retarded to protect themselves against widespread fear and prejudice.

Even technical terms once used to describe different levels of retardation -- "idiot," "imbecile," "moron" and "feebleminded" (as used in the Cleburne zoning ordinance) -- have become popular terms of derision. Gould, The Mismeasure of Man 158 (1981).

SUMMARY OF ARGUMENT

The City of Cleburne singles out group homes for the mentally retarded and subjects them to a discriminatory zoning procedure which requires a wholly discretionary "special use permit" before a group home for the mentally retarded may be established. Unlike homes for the aged, convalescent homes, nursing homes, hospitals, boarding houses, apartment houses and fraternity houses, all of which may be established in Cleburne's R-3 zoning district without special permission, homes for the mentally retarded (or, in the words of the Cleburne statute, "the feeble-minded") must receive a "special use permit", the issuance of which is wholly discretionary and which is conditioned, in large part, on the acquiescence of nearby residents.

This case arises out of the refusal of Cleburne authorities to grant such a "special

use permit" for a supervised group home of thirteen mentally retarded persons, despite the home's approval by the Texas Department of Human Resources and despite the District Court's explicit finding that:

> "[i]f the potential residents of the ... home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance."

Jt. App. 93 (Finding of Fact No. 24).

Where, as here, a vulnerable group which is the target of prejudice and stereotypical fear is singled out for harsher zoning treatment that reinforces its isolation and segregation, obvious dangers of local majoritarian overreaching are present. This case presents a virtual compendium of the mechanisms available in our legal system to protect a vulnerable minority in such a precarious situation.

First, Congress has explicitly forbidden discrimination against the handicapped, including the mentally retarded, by forbidding

treatment which bars otherwise qualified handicapped persons from the use and enjoyment of federally funded programs. 29 U.S.C. § 794; 31 U.S.C. § 6716(b)(2). Where, as here, a town's zoning scheme singles out the mentally retarded and precludes them from establishing an otherwise qualified group residence in the community, the zoning scheme bars the mentally retarded from the enjoyment of Cleburne's federally funded streets, parks, schools, and other services as effectively as if a wall were built around the town. While the act of zoning may not itself be federally funded, Cleburne's discriminatory zoning scheme fences out the mentally retarded from the use and enjoyment of the various programs which concededly receive hundreds of thousands of dollars in Revenue Sharing funds from the federal government and thus is in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the

Revenue Sharing Act, 31 U.S.C. § 6716(b)(2) (1984). Cf. Cannon v. University of Chicago, 441 U.S. 677, 680 (1979).

Second, the Fourteenth Amendment establishes two procedural protections designed to minimize the potential for unfair treatment of vulnerable minorities by forbidding the operation of standardless permit systems aimed solely at vulnerable minorities and by forbidding the government from forcing minorities to run a special majoritarian gauntlet.

The Cleburne zoning scheme, explicitly aimed at homes for the mentally retarded, violates both sets of procedural guarantees. The decision whether or not to grant a special use permit is wholly discretionary, leaving frightened or ignorant officials free to generate post hoc rationales for excluding the mentally retarded without any need to test their decision against pre-existing,

neutral criteria. E.g., Kolender v. Lawson, 461 U.S. 352 (1983); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). In fact, the only criteria present in the statute direct officials to canvas neighboring property owners before permitting a group home for the mentally retarded to be established. Such a standardless permit system keyed to the wishes of neighboring property owners is a virtual invitation to discriminatory treatment. Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).

Finally, at a minimum, the substantive reach of the Fourteenth Amendment forbids zoning decisons which deprive vulnerable minorities of critically important liberty interests on the basis of stereotypical thinking and irrational fear. Where, as here, a community is prepared to permit homes for the aged, convalescent homes, nursing homes, hospitals, boarding houses, apartment

houses and fraternity houses, to single out group homes for the mentally retarded for harsher differential zoning treatment is to surrender to an age-old fear of the mentally retarded which stigmatizes them as dangers to the community. In fact, by any measure of inconvenience or danger to the community, the mentally retarded pose no greater burden than the concentrations of aged, infirm, college age students and just plain families that Cleburne is prepared to welcome into its R-3 district. Yet, of the reasons given by Cleburne officials for denying the zoning permit, most, if not all, flow squarely from irrational and unfounded fear of the mentally retarded. Whether couched as the concerns of neighboring property owners, the fears of the elderly, concerns over who might pay for any damage the mentally retarded might cause, proximity to a junior high school, the number of mentally retarded residents or the lack of

a large enough fenced-in yard for recreation, the common denominator of the town's objections is a stereotypical vision of mentally retarded persons as dangers to the community. Cleburne's fear has absolutely no basis in fact. It hardly requires an expansive view of the Fourteenth Amendment to read it as protecting the mentally retarded from being irrationally stigmatized as dangers to the community and unjustly condemned to languish in segregated institutions. See Palmore v. Sidoti, 80 L.Ed.2d 421 (1984); Reed v. Reed, 404 U.S. 71 (1971).

Moreover, even if Cleburne's officials had been able to mount a less transparent apology for denying the permit, the inability of the mentally retarded to defend their vital liberty interests through the political process, the obvious danger of irrational prejudice directed at a historically despised and misunderstood group, and the critically

important nature of the "liberty" interest at stake combine to require a heightened level of judicial scrutiny designed to assure that a given decision to single out the mentally retarded for adverse treatment does not flow from irrational prejudice, fear, or callous indifference. Just as the concept of burden of proof in criminal cases operates to deflect jury error in favor of constitutional values, so the concept of heightened judicial scrutiny erects a burden of justification designed to deflect error from the very real danger that the vital interests of despised and vulnerable minorities will be undervalued, through both prejudice and callous indifference, in the political process.

Where, as here, a vulnerable minority has been deprived of a critically important liberty interest pursuant to a standardless exercise of official discretion, it is consistent with -- indeed supportive of -- demo-

cratic principles to require officials to demonstrate a substantial basis for their refusal to permit a vulnerable and historically persecuted group to establish a home in their community. And when, as here, officials seek to justify their decision to bar a group home for the mentally retarded by arguing that the housing site may be flooded once every five hundred years or that a site acceptable to the Texas Department of Human Resources is nevertheless inadequate in the eyes of local zoning officials having absolutely no expertise in the area, they have failed to posit sufficiently weighty reasons to satisfy their burden of justification. While the precise level of heightened scrutiny may vary depending upon the nature of the protected group and the importance to the group of the interest at stake, surely it requires more than the transparently disingenuous justifications offered by Cleburne's

officials in this case.

ARGUMENT

I. Cleburne's Zoning Ordinance and Decision to Deny the Special Use Permit Excludes Mentally Retarded Persons from the City and from City Programs and Activities Receiving Federal Revenue Sharing Funds, Thus Violating the Anti-Discrimination Provisions of the Revenue Sharing Act.

Although the court below stressed the equal protection issue of whether governmental classifications based on a person's mentally retarded status constitute "quasi-suspect" classifications deserving heightened judicial scrutiny, this Court can, and therefore should, affirm the decision below on statutory, not constitutional grounds. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., dissenting). The record shows that Cleburne has effectively excluded these mentally retarded persons from the city, thus depriving them of participation in all city programs or activities that receive federal revenue sharing

funds. Thus, even if the zoning activities of the city council are treated as if they received no federal funds, Cleburne cannot hide behind a program-specificity defense when it has excluded the mentally retarded from the city altogether.

A. The Revenue Sharing Act Protects Handicapped Persons Against Discrimination By Recipient Programs or Activities.

The Revenue Sharing Act prohibits "discrimination against an otherwise qualified handicapped individual under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)" by any "program or activity of a ... unit of general local government if the government receives" Revenue Sharing payments. 31 U.S.C. § 6716(b)(2) (1984).

In the years prior to and including the year of trial, Cleburne received substantial federal financial assistance under the Revenue Sharing Act. See Jt. App. 93. The district court found that the Cleburne City

Council had spent the Revenue Sharing funds "in the following ways, among others: (a) road construction; (b) the purchase of capital equipment for the city's department of public works; (c) the purchase of capital equipment for City Hall; (d) water utility systems; (e) parks and recreation; (f) debt service; and (g) library materials." Jt. App. 94.

The district court and the court of appeals both held that the antidiscrimination provisions of the Revenue Sharing Act did not apply to the city's actions in this case, because Revenue Sharing funds had not been used to finance the challenged zoning activities of the city council. Recognizing the program-specific reach of 31 U.S.C. § 6716(b)(2), plaintiffs argued below that the city council itself is an activity receiving federal funds, because the city council decides which specific city programs will ulti-

mately receive the funds. The court of appeals rejected this theory under the circumstances of this case. Jt. App. 121.[16] However, regardless of whether the city council is itself an activity receiving federal funds, by excluding the mentally retarded from the community, the city council has unlawfully excluded them from the enjoyment of and participation in every federally funded program in the community.

---

[16] Cleburne incorrectly argues that CLC has failed to preserve its Revenue Sharing Act claim by not cross-petitioning for certiorari. This Court has held on many occasions that a respondent has the right to urge any argument in support of a judgment in its favor, including contentions rejected by the court below. See, e.g., United States v. Arthur Young & Co., 79 L.Ed.2d 826, 834 (1984); Langnes v. Green, 282 U.S. 531, 535-39 (1931); 12 Moore's Federal Practice ¶ 400.05-5 (1982).

B. The Program-Specific Limits on the Reach of the Anti-Discrimination Provisions of the Revenue Sharing Act and § 504 of the Rehabilitation Act Do Not Bar an Action on Behalf of Handicapped Persons Who Have Been Zoned Out of a City Whose Programs or Activities Receive Federal Revenue Sharing Funds.

Where handicapped persons have been effectively zoned out of an entire city, plaintiffs need not prove that the zoning function of the city council itself received federal financial assistance. Just as a black student denied admission to a segregated school is effectively denied participation in the federally funded science program (and every other program and activity) at the school, a mentally retarded person excluded from residence in a city is effectively denied participation in the city's programs or activities that receive Revenue Sharing funds.

The program-specific nature of the anti-discrimination provisions of the Revenue

Sharing Act, 31 U.S.C. § 6716(b)(2), and of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, cannot bar relief in cases in which handicapped persons have been denied admission to or otherwise excluded from the entity whose programs or activities receive federal financial assistance.

In Cannon v. University of Chicago, 441 U.S. 677 (1979), this Court assumed that proof of sex discrimination in admissions obviated any inquiry into program-specificity under Title IX. This Court explicitly stated that proof of only two facts from Cannon's complaint could establish a violation of § 901(a) of Title IX: (1) that the medical school excluded Cannon because of her sex; and (2) that educational programs at the school were receiving federal financial assistance at the time of the exclusion. Id. at 680.

Grove City College v. Bell, 79 L.Ed.2d

516 (1984), is fully consonant with Cannon's assumption. This Court held in Grove City College that federally guaranteed loans to Grove City College students constituted federal financial assistance to the college, but that the antidiscrimination provisions of Title IX of the Education Amendments of 1972, 20 U.S.C § 1681(a), applied only to the program -- the financial aid office -- that received the student loan money.

If, contrary to fact, Grove City College had an express policy of refusing to admit handicapped persons, and even if the admissions office itself received no federal monies, surely rejected handicapped applicants could have successfully argued that they had been denied participation in all of the College's programs or activities receiving federal financial assistance. The district court in Grove City College explicitly noted that where an institution denies admis-

sion to all members of a protected group, the excluded students are excluded from the benefits of all of the institution's federally funded activities. Grove City College v. Harris, 500 F. Supp. 253, 268 (W.D. Pa. 1980), rev'd, 687 F.2d 684 (3d Cir. 1982), aff'd, 79 L.Ed.2d 516 (1984). This Court agreed with the district court's holding regarding Title IX's program-specifity and did not contradict the district court's reasoning that an exclusion from admission would present a different case.

Lower courts that have correctly recognized the program-specific limitations on the antidiscrimination provisions of Title VI,[17] Title IX,[18] and § 504 of the Rehabilitation Act[19] have distinguished situations in which

---

[17] Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4.

[18] Education Amendments of 1972, 20 U.S.C. §§ 1681-86.

[19] Section 504 was modelled after Title IX, which in turn was modelled after Title VI. All three statutes [cont'd. on next pg]

members of protected groups have been denied admission to the institution which has programs or activities that receive federal financial assistance. See, e.g., Iron Arrow Honor Society v. Heckler, 702 F.2d 549, 563 (5th Cir.), vacated and remanded as moot, 78 L.Ed.2d 58 (1983); Hillsdale College v. HEW, 696 F.2d 418, 428-29 (6th Cir. 1982); Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 n. 2 (1st Cir. 1981) (plaintiff alleging discrimination in admissions to an institution not required to allege that a particular federally funded program discriminated against her, because "[o]ne who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs is tainted"), cert.

---

share common language concerning a "program or activity." See Brown v. Sibley, 650 F.2d 760, 767-68 (5th Cir. 1981).

denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321, 328 (E.D. Va. 1982); Haffer v. Temple University, 524 F. Supp. 531, 539 (E.D. Pa. 1981) ("discriminatory admissions practices ... necessarily taint the entire institution"), aff'd and remanded per curiam, 688 F.2d 14 (3d Cir. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376, 1387 (E.D. Mich. 1981) ("Racial discrimination respecting acceptance or admission into educational institutions permeates all programs and activities within those institutions."), aff'd, 699 F.2d 309 (6th Cir. 1983); see also Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (4th Cir. 1975) (federal veteran's benefits may not be used by eligible veterans who attend university with racially discriminatory admissions policy).[20]

C. Cleburne Has Effectively Excluded Mentally Retarded Persons.

Plaintiff Cleburne Living Center obtained a house at 201 Featherston Street in Cleburne for the purpose of operating a group home for thirteen mildly to moderately mentally retarded persons. State authorities inspected and approved the house for its intended use, provided that certain repairs and modifications were performed. Jt. App. 73-74, 96.

Cleburne's zoning ordinance permits many types of multi-family dwellings and institutional structures to locate in the R-3 residential zone that encompasses 201 Featherston Street, but requires homes for the "feeble-minded" to obtain a special use permit. Jt. App. 61-63, 90-91. The city council denied

---

[20] The sole decision that failed to recognize the "admissions" exception to program-specificity did so without directly addressing the issue. Stewart v. New York University, 430 F. Supp. 1305, 1313-14 (S.D.N.Y. 1976).

CLC's application for a special use permit. The district court found that if the potential residents of 201 Featherston Street had not been mentally retarded, the zoning ordinance would have permitted their use of the home. Id. 93. The court found further that the denial of the special use permit "was motivated primarily by the fact that the residents of the home would be persons who are mentaliy retarded." Id. 94.

In short, the potential residents of the Featherston home were, aside from their mental retardation, "otherwise qualified" to live in a group home in an R-3 district, see Southeastern Community College v. Davis, 442 U.S. 397 (1979), and were denied use of the Featherston home (and consequently, of federally funded city services and facilities) solely by reason of their handicap.

The record indicates that denial of the special use permit had the result of exclud-

ing from the city the thirteen mentally retarded potential residents of the Featherston home. Cleburne's suggestions that a more appropriate alternative location for the group home was available, see City Brief 7 n. 6, 26-27, misstates the record. The only city official who examined the alternative site did not know whether it could have met state standards for intermediate care facilities for the mentally retarded. Jt. App. 46-47. State officials told CLC co-owner David Southern that the alternative site would never be appropriate for a group home for the mentally retarded. Id. 48.

The district court also rejected Cleburne's claim that mentally retarded persons could live elsewhere in Cleburne, other than in a group home. The Court found:

> Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living

> patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Id. 94 (emphasis added).

Nor can Cleburne claim that the potential residents of the Featherston home could live in some other community, yet still participate in or derive benefit from the city's programs or activities that received federal Revenue Sharing dollars. The city spent its Revenue Sharing income on roads, water, parks and recreation, debt service, library materials, and capital equipment, precisely because such amenities were of particular value to Cleburne residents.[21]

Finally, that the exclusion is not absolute does not bar plaintiffs' claim. In Lau v. Nichols, 414 U.S. 563, 566 (1974), for

---

[21] For instance, CLC owners chose the Featherston site in part because of its proximity to a city park. Jt. App. 32.

example, this Court recognized in a Title VI action that teaching the public school curriculum in English to non-English-speaking Chinese students "effectively foreclosed [them] from any meaningful education."[22] The school district did not literally exclude Chinese students from the schools, but the school district's failure to establish a program to rectify the complaining students' language problem had the practical effect of excluding them from the school district's many programs and activities receiving federal funding.[23]

In sum, the requirement of, and subsequent denial of, a special use permit for the

---

[22] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4, prohibits racial discrimination in any program or activity receiving federal financial assistance.

[23] See Johnson v. City of Arcadia, 450 F. Supp. 1363, 1379 (D. Fla. 1978) (blacks successfully challenged, under Title VI, unequal provision of city services, including the location of better parks and recreational facilities in white neighborhoods).

Featherston home as a group home for the mentally retarded excluded otherwise qualified persons from the opportunity to participate in Cleburne's numerous programs or activities receiving Revenue Sharing funds, in violation of the Revenue Sharing Act and § 504. Southeastern Community College v. Davis, 442 U.S. at 412; cf. Alexander v. Choate, 53 U.S.L.W. 4072, 4076 (U.S. Jan. 9, 1985) (no § 504 violation where handicapped had not been excluded from program receiving federal funds).

II. Cleburne's Zoning Procedure Violates Procedural Due Process of Law Because It Requires a Vulnerable Minority to Secure a Wholly Discretionary Permit the Issuance of Which is Largely Dependent on the Acquiescence of Neighboring Property Owners in Order to Establish an Otherwise Qualified Group Home For the Mentally Retarded.

This Court has long recognized that ad hoc discretionary decision-making poses an unacceptably high risk of discriminatory or arbitrary application of the law. E.g.,

Kolender v. Lawson, 461 U.S. 352 (1983); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Thus, whenever a vulnerable group has sought to enjoy a significant liberty interest, the Court has forbidden officials to exercise standardless discretion in deciding whether to permit the activity.

In Lovell v. Griffin, 303 U.S. 444 (1938), for example, the Court invalidated an ordinance which granted the City Manager discretionary power to grant or deny a permit to distribute leaflets. Lovell has been followed by the Court on numerous occasions in striking down First Amendment licensing schemes vesting local officials with excessive discretion to discriminate against disfavored groups.[24]

Similarly, in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and Smith v. Goguen, 415 U.S. 566 (1974), the Court invalidated vague statutes because they vested officials with excessive discretion in dealing with vulnerable minorities.

In Papachristou, the Court noted:

> Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' [quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)]. 405 U.S. at 170.

In Smith v. Goguen, 415 U.S. 566 (1974),

---

[24] E.g., Schneider v. State, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940); Largent v. Texas, 318 U.S. 418 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).

Justice Powell noted for the Court:

> Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. 415 U.S. at 575.

Most recently, in Kolender v. Lawson, 461 U.S. 352 (1983), the Court invalidated a California "stop and identify" statute because it vested excessive discretion in local officials. See also Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Morton v. Ruiz, 415 U.S. 199, 232 (1974); Hornsby v. Allen, 326 F.2d 605, 609-10 (5th Cir. 1964), on petition for rehearing, 330 F.2d 55 (5th Cir. 1964) (per curiam) (invalidating standardless liquor licensing provision); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968) (requiring objective criteria to determine access to public housing).

The Cleburne ordinance vests standard-

less discretion in zoning officials to determine whether to grant a permit to establish a group home for the mentally retarded. Thus, like the City Manager in Lovell, the Mayor in Hynes, and the police in Papachristou, Smith v. Goguen and Kolender, Cleburne's zoning officials are empowered to make standardless, ad hoc decisions about whether to permit a vulnerable minority to enjoy a critical liberty interest. While the liberty interest at stake in this case is different from the liberty interests at stake in Papachristou or Kolender, it is no less significant. For the mentally retarded, the difference between life in an impersonal state institution and life in a group home is the very essence of liberty. See supra at 1-7; cf. Vitek v. Jones, 445 U.S. 480 (1980). When values as critical as freedom of movement, the capacity for self-fulfillment, and the opportunity for a normal life are at stake, the clear teach-

ing of this Court forbids the type of standardless decisionmaking required by the Cleburne ordinance, especially when such standardless decisionmaking is explicitly and selectively aimed at a vulnerable group that has been the target of widespread discrimination.

The only guidance given by the ordinance to Cleburne's officials in determining whether to grant permission to establish a group home for the mentally retarded is a command to ascertain the wishes of all property owners within 200 feet of the proposed home. Jt. App. 63. Indeed, one of the explicit reasons given by Cleburne's officials for denying the permit was the opposition of neighboring property owners. Jt. App. 95. By singling out the mentally retarded and requiring them to run a majoritarian gauntlet of neighboring property owners, Cleburne's ordinance violates established Fourteenth

Amendment norms.

In Eubank v. Richmond, 226 U.S. 137 (1912), the Court invalidated a local zoning ordinance which permitted two-thirds of the property owners abutting on a street to establish a building line because the statute:

> ... create[d] no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously.

226 U.S. at 144.

Similarly, in Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), the Court invalidated a Washington ordinance which provided:

> A philanthropic home for children or for old people shall be permitted ... when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.

278 U.S. at 118.

Noting that no standard or rule governed

the grant of consent, which could be withheld "arbitrarily" and as a matter of "caprice," the Court unanimously invalidated the ordinance. See also Larkin v. Grendel's Den, 459 U.S. 116 (1982).

The Cleburne ordinance does not formally delegate power to abutting landowners as in Eubank or Roberge. Rather, it directs zoning officials to ascertain the wishes of neighboring landowners before exercising a standardless discretion to grant or deny the permit. Where, as here, officials freely admit that they acted as conduits for the wishes of the neighboring landowners, surely the lack of a formal delegation is not sufficient to distinguish Roberge.

Moreover, where, as here, the obligation to consult neighboring landowners before establishing a group home is not a general obligation imposed on all land-users, but is discriminatorily aimed at the mentally re-

tarded, the principles of Reitman v. Mulkey, 387 U.S. 369 (1967), and Hunter v. Erickson, 393 U.S. 385 (1969), compel invalidation of the ordinance. In both Reitman and Hunter, the Court invalidated schemes that required a vulnerable minority to run a special majoritarian gauntlet before enjoying open housing legislation. Under the Cleburne ordinance, the mentally retarded must undergo not merely the general majoritarian gauntlets found invalid in Reitman and Hunter, but the special gauntlet of neighboring property owners found especially offensive in Eubank and Roberge. When one pyramids the ordinance's lack of criteria, its deference to the wishes of neighboring landowners and its explicitly discriminatory application to the mentally retarded, it fails to meet minimal standards of procedural regularity.[25]

---

[25] In James v. Valtierra, 402 U.S. 137 (1971), and Eastlake v. Forest City Enterprises, 426 U.S. 668
[cont'd. on next pg]

III. Cleburne's Refusal to Grant Permission to Establish a Group Home for the Mentally Retarded Violates the Equal Protection Clause Because (A) It Was Based on Stereotypical Fears Concerning Mental Retardation, and (B) It Is Not Supported By A Substantial Justification.

A. Cleburne's Resort to Stereotypical Thinking.

At a minimum, the Equal Protection Clause requires officials to avoid invidious stereotypical thinking in making governmental decisions. E.g., Palmore v. Sidoti, 80 L.Ed.2d 421 (1984); Reed v. Reed, 404 U.S. 71 (1971). One reason why race, sex, alienage and illegitimacy have provided such fertile grounds for equal protection jurisprudence is that fear and prejudice have too often generated stereotypical decisionmaking aimed at such vulnerable and historically disadvan-

---

(1976), the Court upheld referenda on proposed zoning changes. However, unlike the Cleburne ordinance, the referenda in Valtierra and Eastlake did not overvalue the interests of abutting landowners and, most importantly, were not discriminatorily utilized only when a vulnerable minority sought to enter the neighborhood.

taged groups. The adoption of heightened equal protection scrutiny in connection with such groups has reflected this Court's awareness that stereotypical thinking affecting certain vulnerable groups is so prevalent in our society that any decision which adversely affects them carries a risk of stereotypical content. The imposition of a heightened burden of justification in such cases is designed to assure that significant governmental interests rooted in reality -- and not prejudice -- underly the adverse action. As such, heightened scrutiny is a means of deflecting error away from invidious stereotypical treatment of vulnerable groups, much as burden of proof rules deflect error in other constitutional contexts. E.g., Addington v. Texas, 441 U.S. 418 (1979); Santosky v. Kramer, 455 U.S. 745 (1982).

In this case, the degree to which uninformed, stereotypical thinking about the

mentally retarded dominated the decision to deny permission to establish the group home is all too obvious. Jt. App. 24-31 (testimony of city council members); Jt. App. 95 (list of reasons for denial of permit). Fear of the mentally retarded literally permeated every aspect of the zoning process, beginning with the decision to treat the "feeble-minded" differently in the zoning statute and culminating in the litany of fear that passed for rationality in the District Court.

Of the six[26] reasons given to justify denial of the permit, four[27] explicitly reflect irrational fear of the mentally retarded and the fifth[28] is an indirect manifestation of such fear. Given the overwhelming

---

[26] The seventh "in general, the presentation made before the City Council" is so devoid of content as to render it meaningless.

[27] Jt. App. 95 (reasons a, b, c, and e).

[28] Jt. App. 95 (reason d).

BEST AVA

role played by stereotypical fear in denying the permits, resort to heightened scrutiny as a means of deflecting error is not necessary to brand Cleburne's actions unlawful. As the Court has noted, when obvious stereotypical thinking has deprived a vulnerable group of a significant interest, the rational-basis standard of review, rigorously applied, can be an effective guaranty of fair treatment. E.g., Baxstrom v. Herold, 383 U.S. 107 (1966); Rinaldi v. Yeager, 384 U.S. 305 (1966); Jackson v. Indiana, 406 U.S. 715 (1972); James v. Strange, 407 U.S. 128 (1972).

Thus, in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court utilized rational basis scrutiny to invalidate a limitation on eligibility for food stamps that appeared to be based upon stereotypical thinking about "hippies" and "hippie communes." Similarly, in United

LABLE COPY

States Department of Agriculture v. Murry, 413 U.S. 508 (1973), the Court invalidated a limitation on food-stamp eligibility that forced administrators to treat households stereotypically, instead of on the basis of reality. See also, Jimenez v. Weinberger, 417 U.S. 628 (1974); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

Rational basis review is not a synonym for upholding a government decision. Rather, it should signal a serious inquiry into whether a challenged government classification has its roots in fact or is founded on impermissible stereotypes. Where, as here, the dominance of stereotypical thinking could not be more apparent, Cleburne's decision to exclude the group home in question is plainly violative of the Equal Protection Clause. Indeed, both the State of Texas, Brief at 5, and the Solicitor General, Brief at 6, 10, virtually concede as much.

When, as in Belle Terre v. Boraas, 416 U.S. 1 (1974), an exclusionary zoning decision is based not on stereotypical thinking about the category of person involved, but on a legitimate fact-based concern for population density and the impact of transiency on a neighborhood, application of rigorous rational basis scrutiny will generally uphold the zoning decision. But when, as in Buchanan v. Warley, 245 U.S. 60 (1917), and Moore v. Village of East Cleveland, 431 U.S. 494 (1977), exclusionary zoning decisions are based, respectively on stereotypes about race and the appropriate definition of family, they cannot survive a properly administered rational basis scrutiny.[29] Where, as here,

[29] Strictly speaking, Moore v. Village of East Cleveland, supra, was not an equal protection case, since the Court elected to analyze it as a substantive due process case. 431 U.S. at 496 n. 3 (plurality opinion). However, the Court stressed the degree to which the East Cleveland definition of family failed to accord with the reality of the extended family prevalent in many social groups.

BEST AVAILABLE COPY

stereotypes about the mentally retarded literally dominated the decisionmaking process, Belle Terre can hardly provide support for Cleburne's decision.

B. The Relevance of Heightened Scrutiny.

This Court has repeatedly recognized that when vulnerable groups that have traditionally been the target of stereotypical thinking are singled out for disfavored treatment, rational basis review often fails to provide sufficient protection against the danger of stereotypical decisionmaking. E.g., United States v. Carolene Products Co., 304 U.S. 144, 152-53 & n. 4 (1938); Korematsu v. United States, 323 U.S. 214 (1944); Plyler v. Doe, 457 U.S. 202 (1982). The Court has recognized that it is too easy to cloak prejudice and ignorance in the guise of a post hoc rationalization. In order to minimize the very real danger that vulnerable groups will be unable to prevent adverse stereotyp-

ical treatment at the hands of officials whose ignorance or fear blinds them to reality, this Court has imposed a burden of justification on officials wishing to treat such a victim group in an adverse manner. The effect of such heightened scrutiny is, as Korematsu attests, not a total prohibition on adverse action, but a prophylactic guaranty that such adverse action is predicated not on ignorance, fear or prejudice, but rather on legitimate governmental concerns. Where a historically unpopular and vulnerable group is treated adversely without substantial factual justification, a lingering and unacceptable doubt persists that stereotypical thinking and/or callous indifference was at work. Heightened scrutiny, by forbidding adverse treatment in the absence of a substantial factual basis, serves to minimize that risk.

Of course, when there is no reason to

fear the existence of invidious stereotypical thinking or a pattern of callous neglect, no reason exists to deflect error against it. In such settings, rational basis scrutiny, if applied in a rigorous manner, serves adequately to guard against majoritarian overreaching. But when the historic pattern of stereotypical thinking and callous neglect of a vulnerable group is manifest -- as it is with the mentally retarded -- the application of heightened scrutiny to guard against the unfair and unnecessary undervaluing of their vital interests by a frightened majority is fully compatible with democratic political theory -- indeed, it reinforces the legitimacy of the democratic process.

Cleburne's officials have asserted only two allegedly fact-based justifications for denying the permit.[30] First, they argue that

---

[30] The other justifications do not even purport to be rooted in fact and are, instead, expressions of irrational fear of the mentally retarded. See supra
[cont'd. on next pg]

the premises may be flooded once every five hundred years. Jt. App. 95. Why homes for the aged and the convalescent are less vulnerable to such a flooding risk is left a mystery. Second, despite the approval of the site by the Texas Department of Human Resources, Cleburne's zoning officials question its suitability because it lacks a large enough fenced-in yard and has only four bedrooms. The short answer to such a justification is that it seeks to substitute the untutored judgment of local zoning officials[31] for the judgment of Texas officials vested with the professional responsibility for supervising group homes for the mentally retarded.

Taken together, Cleburne's objections

---

page 48.

[31] The trial testimony of Cleburne's officials revealed an almost total ignorance of the mentally retarded and their needs. Jt. App. 24-31.

based on the 500-year flood plain and the alleged lack of space fail to meet even a rationality standard. Even if they did, however, a lingering question would remain as to whether the denial was based on irrational fear of the mentally retarded. The purpose of heightened scrutiny is to dispel that lingering question by requiring a factual justification sufficient to put it to rest. Given the vulnerability of the mentally retarded to stereotypical treatment, the importance of the liberty interest at stake and the woeful inadequacy of Cleburne's attempt at a factual justification for its decision, heightened scrutiny, if necessary, is clearly appropriate to minimize the risk of majoritarian overreaching.

In Moore v. Village of East Cleveland, 431 U.S. 494 (1977), this Court utilized a form of heightened scrutiny to invalidate a zoning ordinance restrictively defining the

concept of "family." In Moore, the interest in family privacy was deemed sufficient to trigger heightened scrutiny under the Due Process Clause. In this case the interest of the mentally retarded in escaping from the prison of large, impersonal institutions in order to enjoy the freedom of movement and opportunity for self-fulfillment which are available to them only in a group home setting is fully comparable to the interest in family integrity which triggered strict scrutiny in Moore. Cf. Vitek v. Jones, 445 U.S. 480 (1980). Moreover, the discriminatory nature of the Cleburne ordinance, which singles out a despised and vulnerable minority for exclusionary zoning, is even more

appropriate for heightened scrutiny than the East Cleveland ordinance in Moore.[32]

[32] Given this Court's recent admonition to counsel that they have a "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation," Board of License Commissioners v. Pastore, 53 U.S.L.W. 4057, 4058 (U.S. Jan. 8, 1985) (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)), amici note that the parties as well as other amici have debated a suggestion of mootness caused by a state regulation that limits the size of group homes for the mentally retarded to six persons. The Featherston home would have housed thirteen persons.

CONCLUSION

For the above stated reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

BURT NEUBORNE
(Counsel of Record)
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
212/944-9800*

ROBERT M. LEVY
New York Civil Liberties
Union
132 West 43rd Street
New York, New York 10036
212/382-0557

PAUL HOFFMAN
STANLEY FLEISHMAN
JOSEPH LAWRENCE
JAMES PREIS
American Civil Liberties
Union Foundation of
Southern California
633 South Shatto Place
Los Angeles, California 90005
213/487-1720

JAMES C. HARRINGTON
American Civil Liberties
Foundation of Texas
600 West 7th Street
Austin, Texas 78701
512/477-5849

Dated:
New York, New York
February 2, 1985

* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate whose application for admission to the New York State Bar is pending.

Office-Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-468

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

AMICUS CURIAE BRIEF FOR THE STATE OF TEXAS AND THE TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

J. PATRICK WISEMAN
Chief, State & County Affairs

JAMES C. TODD
Assistant Attorney General
PHILIP DURST
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Counsel for Amici

February 2, 1985

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT AND AUTHORITY 4

I. Introduction: The Court Need Not Decide Whether the Mentally Retarded are a "Quasi-Suspect Class" ... 4

II. The City Zoning Ordinance and Application Thereof in This Case Run Counter to the Public Policy of Texas 4

A. The Public policy of Texas favor group homes for the mentally retarded in normal residential neighborhoods 5

B. The public policy of Texas favors the provision of community living alternatives for the mentally retarded through a pluralistic combination of State, local public, and private services 10

III. The Disparity of Treatment Between Group Homes for the Mentally Retarded and Facilities for Other Special Needs Populations Does Not Rationally Serve Any Valid Governmental Objective Which the City May Pursue Through Its Zoning Powers 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES: **Page**

Aladdin's Castle, Inc. v. City of Mesquite, 701 F.2d 524 (5th Cir. 1983) 12

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 12

Cleburne Living Center v. City of Cleburne, 726 F.2d 191, *reh. en banc den.* 735 F.2d 832 (5th Cir. 1984) 3,13

Coffee City v. Thompson, 525 S.W.2d 758 (Tex.Civ.App.—Tyler 1976, writ ref. n.r.e.) 14

Euclid v. Ambler Co., 272 U.S. 365 (1926) 14

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 13

Lelsz v. Kavanagh, C.A. No. S-74-95-CA (E.D. Tex., unpub. order and memorandum opinion July 19, 1983) 10

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 12

Schweiker v. Wilson, 450 U.S. 221 (1981) 12

Smart v. Lloyd, 370 S.W.2d 245 (Tex.Civ.App.—Texarkana 1963, no writ) 12

Swain v. Board of Adjustment, 433 S.W.2d 727 (Tex.Civ.App.—Dallas 1968), *cert. denied* 396 U.S. 277 (1970) 12

Wallace v. Daniel, 409 S.W.2d 184 (Tex.Civ.App.—Tyler 1966, writ ref. n.r.e.) 14

Zobel v. Williams, 457 U.S. 55 (1982) 4,12,15

CONSTITUTIONS

U.S. CONST., amendment 14 12

TEX. CONST. art. XI §§4-5 12

STATUTES

TEX. HUM. RES. CODE §32.001 *et seq.* 11

Texas Mental Health and Mental Retardation Act of 1965, TEX. REV. CIV. STAT. art. 5547-201 *et seq.* 1,5,8,10,11

Texas Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. art. 5547-300 1,5-8

TEX. REV. CIV. STAT. arts. 961 *et seq.* 12

TEX. REV. CIV. STAT. art. 1011a 12,14

TEX. REV. CIV. STAT. arts. 1133 *et seq.* 12

TEX. REV. CIV. STAT. arts. 1175 *et seq.* 12

Developmentally Disabled Assistance and Bill of Rights Art of 1975, 42 U.S.C. §6012 2

Title XIX of the Social Security Act, 42 U.S.C. §1396d(a)(15) 11

REGULATIONS

25 Tex. Adm. Code §§145.211-145.244 11

25 Tex. Adm. Code §§405.531-405.540 11

40 Tex. Adm. Code §§27.1-27.9807 11

MISCELLANEOUS

1981 Tex. Gen. Laws 3593 11

INTEREST OF AMICI

Recognizing the need and obligation to provide and promote certain specialized services and protections for Texas citizens who are mentally retarded, the State of Texas created the Texas Department of Mental Health and Mental Retardation (TDMHMR) amd authorized that agency to implement public policy pertaining to the mentally retarded. Texas Mental Health and Mental Retardation Act of 1965, TEX.REV.CIV.STAT. art. 5547-201 *et seq.* ("MHMR Act"), at art. 5547-202; Texas Mentally Retarded Persons Act of 1977, TEX.REV.CIV.STAT. art. 5547-300 ("MRPA"), at §§58-60. Under the MRPA, *Amicus* TDMHMR is "delegated the authority to carry out its responsibilities set forth in [that] Act." *Id.* at §58(b). The Attorney General of the State of Texas, who represents *Amicus* TDMHMR and the State of Texas herein, is authorized by the MRPA to bring an action in the name of the State to insure compliance with the Act and TDMHMR regulations thereunder. *Id.* at §65(a). As is more fully discussed in part II of the Argument below, the public policy of the State of Texas concerning its mentally retarded citizens gives the State and its agency TDMHMR a vital interest in the outcome of the case now before this Court. That public policy mandates a preference for (1) normalized community-based living alternatives for the mentally retarded, (2) made available through a pluralistic approach involving State, local, and private providers. Any decision which has the effect of permitting a local governmental entity such as Petitioner City of Cleburne (hereinafter, usually "the City") to exercise its zoning powers so as to exclude State-authorized group homes from normal residential neighborhoods will serve to undermine both facets of this Texas public policy.

Consequently, on behalf of the State of Texas, TDMHMR now appears, through the Attorney General of Texas, as *amicus curiae*, to explain the policy interest of the State, as it bears on "rational basis" scrutiny of the contested City ordinance.

STATEMENT OF THE CASE

In July of 1980, Plaintiff Cleburne Living Center, a private corporation devoted to the provision of community-based

residential services to mentally retarded persons, obtained a house at 201 Featherston Street in Cleburne, Texas, as a site for a supervised group home. The home was to be operated as a "Level I Intermediate Care Facility for the Mentally Retarded" (ICF/MR), in accordance with state and federal regulations. The house was inspected and approved for the intended use by the appropriate State authorities. However, Plaintiffs Hannah (the property owner) and CLC were instructed by City of Cleburne officials to seek a "special use permit" before they could operate the group home. Section 8 of the City's zoning ordinance permits property in the zone encompassing 201 Featherston Street to be used for, *inter alia*, apartment houses, "multiple dwellings," board and lodging houses, fraternity or sorority houses or dormitories, "philanthropic or eleemosynary institutions," and "hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts." (J.A. 61-62, 90, Finding of Fact 12, emphasis added). Section 16, subdivision 9 of the ordinanace requires "special use permits" for "hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions," wherever such facilities might be located in the City. (J.A. 63). (The responsible City staff member acknowledged that a boarding home for paroled felons or delinquent youth might be a permitted use. Tr. 76-277.) If the intended group home herein had been the same in all other respects except that its potential occupants were not mentally retarded, it would constitute a permitted use under the City's zoning ordinance. (J.A. 93, Finding of Fact no. 24).

In August of 1980, the City's Planning and Zoning Commission recommended denial of the special use permit, which the City Council did in October. The primary basis for the denial was the mental retardation of the intended residents of the group home. (J.A. 94, Finding of Fact no. 20). In November of 1980, Plaintiffs Cleburne Living Center (now named Community Living Concepts), Jan Hannah (the owner of the 201 Featherston Street property), Johnson County Association for Retarded Citizens, and Advocacy, Inc. (the Texas "protection and advocacy system" established pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6012) filed suit in U.S. District Court against the City and certain of its officials. After a bench trial, Judge Robert Porter

entered judgment on October 4, 1982, along with an unpublished memorandum opinion, denying relief in all respects. The U.S. Court of Appeals for the Fifth Circuit reversed that decision on March 5, 1984, holding that mentally retarded persons are a "quasi-suspect class," so that under "heightened scrutiny," the City ordinance and the City's denial of a special use permit thereunder denied equal protection. 726 F.2d 191 (5th Cir. 1984). On July 6, 1984, the Court of Appeals *en banc* denied rehearing, 735 F.2d 832, whereupon this Court granted *certiorari* on November 13, 1984.

SUMMARY OF ARGUMENT

The public policy of the State of Texas encourages the establishment of group homes for the mentally retarded in normal residential neighborhoods. Given this policy, it is in the State's interest that private entrepreneurs have an incentive to assume the risks and start-up costs of creating such residential alternatives, so that the State and local community MHMR centers do not carry the entire fiscal burden. The exercise of local zoning powers to exclude such privately operated (but State regulated and jointly State and federally financed) group homes from normal residential neighborhoods frustrates State public policy.

To preserve the equal protection remedy fashioned below, which is congruent with State policy and State interests, it is not necessary for this Court to reach the question of whether the mentally retarded constitute a "quasi-suspect class" requiring "heightened scrutiny." Even under the more lenient "rational basis test," the challenged City ordinance must fall. The discriminatory distinction which that ordinance creates, between group homes for the mentally retarded and multiple-occupant residential facilities for the non-retarded, including facilities for other special needs populations (such as elderly nursing home residents and tubercular sanitarium patients), does not rationally advance any valid governmental objective which, under Texas law, a municipality may serve through its zoning powers. Zoning powers are delegated to the City from the State and may not serve any end not assigned by State law as a purpose of zoning. Thus, the City is precluded, as a matter of State law, from arguing that the ordinance's discrim-

inatory classification scheme is "rationally related" to differences in the service needs of the mentally retarded as compared to those of other special needs populations permitted to reside in the neighborhood in question. The authority and responsibility to determine how the unique service needs of the mentally retarded affect their need and ability to live in community-based group homes is expressly granted to *Amicus* TDMHMR and not to local zoning authorities. The purposes which the City is authorized by State law to promote through its zoning function concern the health, welfare, safety, and morals of the public — more particularly, the adjoining property owners in the use and enjoyment of their property. The City has never identified any adverse impact on the surrounding property that rationally could serve to distinguish the mentally retarded from aged nursing care patients, sanitarium or other permitted hospital clientele, or other permitted residents. Consequently, the lower opinion should be affirmed, but on the more narrow grounds proposed herein.

ARGUMENT AND AUTHORITY

I. Introduction: The Court Need Not Decide Whether the Mentally Retarded are a "Quasi-Suspect Class."

To find the challenged City zoning ordinance herein constitutionally infirm as a violation of equal protection, it is not necessary for this Court to reach the question of whether the mentally retarded constitute a "quasi-suspect class" so as to invoke heightened scrutiny. It is the position of the State of Texas that, on the facts of this case, the City's exclusionary zoning cannot withstand the more lenient scrutiny under the "rational basis test." Consequently, as a matter of judicial economy and restraint, the Court should allow the result below to stand, but on the more narrow grounds that the contested City zoning ordinance does not rationally serve any valid governmental purpose. See *Zobel v. Williams*, 457 U.S. 55 (1982) at 60-61 ("if the statutory scheme cannot pass even the minimal test..., we need not decide whether enhanced scrutiny is called for").

II. The City Zoning Ordinance and Application Thereof in this Case Run Counter to the Public Policy of Texas.

A. The public policy of Texas favors group homes for the mentally retarded in normal residential neighborhoods.

The legitimacy of any purposes asserted by the City, a subdivision of the State, for excluding a group home for the mentally retarded from a residential neighborhood should be analyzed in the context of the public policy of Texas. That policy clearly favors community residential facilities, such as group homes, which enhance the mentally retarded citizen's ability to live and function productively and independently in society. The Texas Legislature has announced the purpose of the 1965 MHMR Act, *supra*, to be "to provide, coordinate, develop, and improve services for the mentally retarded persons of this state to the end that they will be afforded the opportunity to develop their respective mental capacities to the fullest practicable extent and to live as useful and productive lives as possible." *Id.* at art. 5547-201 §1.01(a). In furtherance of that goal, the Act declares that "it is the policy of this state that when appropriate and feasible, ... mentally retarded persons shall be afforded treatment in their own communties." *Id.* at §1.01(c). The statute then delegates to the State Commissioner of Mental Health and Mental Retardation (not to local city councils in the exercise of their zoning powers) the authority to "determine for persons exhibiting the various forms of mental disability the types of services for the mentally disabled that can be most economically and effectively delivered at the community level ..." *Id.* at §2.12A(a). TDMHMR is given the power and duty to "designate the facility in which any mentally retarded person under its jurisdiction is placed ..." *Id.* at §2.19.

The 1977 MRPA, *supra*, reinforces the State's commitment to community living opportunities for the mentally retarded, by guaranteeing the following rights:

> SUBCHAPTER C. BASIC BILL OF RIGHTS
>
> Purpose
>
> Sec. 4. The purpose of this subchapter is to recognize and protect the individual dignity and worth of mentally retarded persons.
>
> * * * *

Right to least restrictive living environment
Sec. 7. Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities. This includes the person's right to live in a variety of living situations, such as the right to live alone, *in a group home*, with a family, and in a supervised, protective environment.

* * * *

Right to equal housing opportunities
Sec. 10. No owner, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent, or lease any real property, or agency or employee of any of these shall refuse to sell, rent, or lease to any person or group of persons solely on the basis of mental retardation.

* * * *

Right to treatment and habilitative services
Sec. 11. Every mentally retarded person shall have the right to receive adequate treatment and habilitative services for mental retardation suited to the person's individual needs *to maximize the person's capabilities and enhance the peron's ability to cope with his environment.*[1] Such treatment and habilitative services shall be administered skillfully, safely, and humanely with full respect for the dignity and personal integrity of the person.

* * * *

---

1. Evidence introduced by Plaintiff's (Respondents herein) at trial and reflected in the District Court's findings shows that for many mentally retarded persons, community living arrangements, such as group homes, are essential for maximizing the person's capabilities and enhancing the person's ability to cope with his environment.

SUBCHAPTER D.
ADDITIONAL RIGHTS OF CLIENTS[2]

Additional rights

Sec. 14. In addition to the rights guaranteed in Subchapter C of this Act, clients shall have the rights enumerated in this subchapter.

* * * *

Right to least restrictive alternative

Section 15. Each client shall have the right to live in the least restrictive habilitation setting appropriate to the individual's needs and be treated and served in the least intrusive manner appropriate to the individual's needs.

* * * *

SUBCHAPTER E.
ADDITIONAL RIGHTS OF RESIDENTS[3]

* * * *

Sec. 25. Residents shall also have the ... right to a normalized residential environment ...

MRPA, *supra* (emphasis added). TDMHMR is instructed to "promulgate rules and regulations to ensure the implementation of the rights guaranteed in Subchapters C, D, and E of this Act." *Id.* at §26. The Texas legislature has forcefully stated the public policy which underpins the rights above, in the Act's declaration of purpose:

> (a) It is the public policy of the state that mentally retarded persons should have the opportunity to develop to the fullest extent possible their potential for becoming productive members of society...

---

2. The MRPA defines a "client" as "a person receiving mental retardation services from [TDMHMR] or [a local] community center [created by the MHMR Act]." MRPA, *supra*, at §3(12).

3. The MRPA defines a "resident" as "a person living in and receiving services from a residential care facility of [TDMHMR] or a community [MHMR] center." *Id.* at §3(13).

> (b) The legislature recognizes that the preservation and promotion of home-living situations where feasible is desirable. When home-living situations are not possible and placement in a residential facility for mentally retarded persons is necessary, the legislature declares that those persons must be admitted ... to a facility ... which fosters the personal development of the resident and enhances the person's ability to cope with the environment.
>
> (c) *Recognizing that persons have been denied rights solely on the basis of mental retardation,* the legislature seeks to educate the general public to the fact that mentally retarded persons who have not been adjudicated incompetent and for whom a guardian has not been appointed by a due process proceeding in a court of law have the same rights and responsibilities enjoyed by all citizens of Texas. *The legislature urges all citizens to assist mentally retarded persons in acquiring and maintaining their rights and in participating in community life as fully as possible.*

MRPA, *supra*, at §2 (emphasis added). The responsiblity for implementing the foregoing public policy rests with *Amicus* TDMHMR. The Texas Board of MHMR is charged with "formulat[ing] the basic and general policies, consistent with the purposes, policies, principles, and standards stated in [the MHMR] Act, to guide the Department in administering this Act." MHMR Act, *supra*, at §2.11(a). Pursuant to that authority, the Board over the years has promulgated policies to promote the right of mentally retarded citizens to live in community-based residential facilities. Among the most recent statements of this policy are the following. A February 24, 1984, Mission Statement declares:

> The Department shall assure that ... mentally retarded individuals .. are afforded treatment in their own home communities whenever appropriate and feasible. Toward this end the Department shall emphasize those services for mentally ill and mentally retarded persons which are effective alternatives to treatment in large residential facilities.

Pursuant to that mission, the Board adopted the following goals:

> *GOAL #2: CONTAINMENT*
> The Department shall increase to the extent appropriate and feasible the number of mentally ill and mentally retarded children and adults who leave state facilities to return to their own communities, and shall reduce to the extent appropriate and feasible the number of mentally ill and mentally retarded children and adults who leave their own communities to be served elsewhere.
>
> *GOAL #3: COMMUNITY ALTERNATIVES*
> The Department shall place primary emphasis on developing and maintaining in communities those specific services for mentally ill and mentally retarded children and adults which have been demonstrated by scientific research to be effective alternatives to care and treatment in large residential facilities.
>
> Sub-goal 3.4: The Department shall develop and maintain an array of residential alternatives in communities to provide living environments for mentally ill and mentally retarded persons suitable to their individual needs and abilities.

As recently as December 7, 1984, the Board reaffirmed its commitment to these goals by delaring:

> Individuals with mental retardation shall receive services in their own local communities whenever appropriate and feasible. ... Therefore, the Board, through its budget-approval and policy-making roles, shall endeavor to support with adequate resources the ... development of an expanded range of alternative programs in the communities of Texas. [S]uch expansion of the range of community services is essential to provide a balanced and effective delivery system for mentally retarded persons ... Therefore, the Board reaffirms

> its policy to continue ... to expand the range of community alternatives available to people with mental retardation.
>
> * * * *
>
> In accordance with these policies and in furtherance of previously approved policies of this Board, the Commissioner is authorized and directed as follows:
>
> * * * *
>
> B. To identify legal, programmatic, financial and attitudinal barriers to community residential services and to take all reasonable steps to eliminate such barriers.

The foregoing policy is furhter reinforced in commitments made on behalf of the State and TDMHMR in the settlement of a ten-year class action lawsuit against three TDMHMR state schools (institutions) for the mentally retarded. *Lelsz v. Kavanagh*, C.A. No. S-74-95-CA (E.D. Tex., order and memorandum opinion July 19, 1983). As part of the *Lelsz v. Kavanagh* Settlement Agreement, the State of Texas and TDMHMR committed themselves to "use their best efforts to overcome all obstacles and barriers to the creation of facilities and programs for habilitation outside the institution." *Lelsz v. Kavanagh*, supra, slip op. at 10.

B. The public policy of Texas favors the provision of community living alternatives for the mentally retarded through a pluralistic combination of state, local public, and private services.

For TDMHMR to fulfill its State mandate to ensure that eligible mentally retarded persons are provided community residential placement, such living alternatives must in fact be available. State law and public policy envision the delivery of community residential services to the mentally retarded by a variety of providers. First, TDMHMR is authorized to establish and directly administer community-based residential facilities for the mentally retarded, as alternatives to large State institutions. MHMR Act, *supra*, at art. 5547-202 §2.17(a). Second, the Legislature has authorized the creation of community MHMR

centers by local governmental bodies. *Id.* at art. 5547-203. "It is the policy of this state that community centers strive to develop services for the ... mentally retarded that are effective alternatives to treatment in large residential facilities." *Id.* at §3.01A.

Finally, State public policy encourages the creation of community residential alternatives by private service providers. The federal "Medicaid" statute (Title XIX of the Social Security Act) offers states an optional program whereby public and private "intermediate care facilities for the mentally retarded" (ICF/MRs) can receive federal (matched by State) reimbursement for residential services to mentally retarded clients. 42 U.S.C §1396d(a)(15). Texas has chosen to participate in this program. TEX.HUM.RES.CODE §32.001 *et seq.* ICF/MR funding has become the primary source of inducement for private providers (both profit and non-profit) to establish group homes for the mentally retarded in normal residential neighborhoods in Texas.[4] Plaintiff/Respondent Cleburne Living Center (now Community Living Concepts) sought to operate a private ICF/MR in Cleburne, Texas. Various facets of the operation of a private community- based ICF/MR are regulated by the Texas Departments of Health, of MHMR, and of Human Resources, respectively. 25 Tex.Adm.Code §§145.211-145.244, 405.531-405.540; 40 T.A.C. §27.1-27.9807. The State regards it as in its interests to have private entrepreneurs assume the risks and start-up costs of at least a portion of the many group homes that must be established throughout Texas, so that TDMHMR and local community centers do not have to shoulder the entire burden and so that a variety of approaches can be attempted. In its statement of purpose, the MRPA declares: "The responsibility placed upon the state [by this Act] shall not in any way replace or impede parental rights and responsibilities or terminate the activities of those persons, groups, and associations that advocate for and assist mentally retarded persons." MRPA, *supra*, at §2(a).

---

4. Consequently, the 1981 appropriations act expresses "the intent of the Legislature that the Department of Mental Health and Mental Retardation ... maximize the use of Title XIX federal funds [to] accomplish the duties of [TDMHMR]," including "programs for Intermediate Care for Mentally Retarded." 1981 Tex. Gen. Laws at 3593.

III. The Disparity of Treatment Between Group Homes for the Mentally Retarded and Facilities for Other Special Needs Populations does not Rationally Serve any Valid Governmental Objective Which the City may Pursue Through its Zoning Powers.

When a statute which serves to exclude or disadvantage one class vis-a-vis others is subjected to "minimal scrutiny" under the equal protection clause of the Fourteenth Amendment, the distinction created by the statute must promote some valid governmental purpose in order to withstand constitutional attack. See *Schweiker v. Wilson*, 450 U.S. 221 (1981) at 235 (the disparity must "rationally advanc[e] a reasonable and identifiable governmental objective"); *Zobel v. Williams, supra*, at 62 (defendant "has shown no valid state interests which are rationally served"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) at 438-442 (concurring opinion). To determine whether the contested City ordinance herein rationally serves or advances a valid, reasonable, and identifiable governmental objective, it is necessary first to ascertain what purposes the City legitimately may pursue through its zoning powers. The City is a political subdivision of the State and derives its authority from State law. TEX. CONST. art. XI §§4-5; TEX.REV.CIV.STAT. arts. 961 *et seq.*, 1133 *et seq.*, 1175 *et seq.* The State has chosen to delegate to the City the *function* of zoning. TEX.REV.CIV.STAT. art. 1011a; *Smart v. Lloyd*, 370 S.W.2d 245 (Tex.Civ.App.—Texarkana 1963, no writ) at 248 ("The power of the City to zone is that delegated to it by the State"). However, the *purposes* to be served by the exercise of the zoning function are still subject to definition and delimitation by State law and policy.[5] It follows that the City is restricted in

---

5. "Texas courts have invariably interpreted section 5 [of TEX. CONST. art XI] to mean that a municipality may not prohibit any activity sanctioned by state law. Texas case law defines both sanction and prohibition broadly. An activity is sanctioned by state law if it is regulated, taxed, licensed, or otherwise directly addressed, but not expressly prohibited, by state legislation." *Aladdin's Castle, Inc. v. City of Mesquite*, 701 F.2d 524 (5th Cir. 1983) at 529-530 (citations omitted), following remand from this Court, 455 U.S. 283 (1982). See also *Swain v. Board of Adjustment*, 433 S.W.2d 727 (Tex.Civ.App. — Dallas 1968) at 731 ("The City ... is confined in its exercise of power to pass a comprehensive zoning ordinance to the express authority granted it by the legislature"), *cert. den.* 396 U.S. 277 (1970).

the purposes it may claim to be serving by its exclusionary zoning. Thus any governmental purpose preempted by the State, or not delegated to the City, could not be a "valid governmental objective" which the City could purport to further by its discriminatory classification. *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) at 116-177, in which this Court invalidated a discriminatory U.S. Civil Service Commission rule in part because the purposes advanced to justify the rule were not within the purview of the Commission but were the province of other agencies or branches of the government.

The challenged City zoning ordinance allows specialized facilities for certain special needs populations to be established in the neighborhood in question without prior City approval. These include nursing homes for the elderly, homes for delinquent youth, and even perhaps homes for paroled felons. See Statement of the Case, *supra*. However, a group home for the mentally retarded must seek a special use permit, with the very real prospect of denial (as this case shows). To survive "minimum scrutiny" for equal protection purposes, the City's discrimination between the mentally retarded and other special needs populations must rationally advance some valid governmental objective which the State has permitted the City to serve through zoning. The dissent to the denial of *en banc* review below suggested certain differences between the mentally retarded and other special needs populations which might constitute a rational basis for the discriminatory treatment:

> And, in respect to the appropriate living, caring, and educational environment, the general subject under consideration here, the retarded are meaningfully different not only from nonretarded generally but also from other groups for which special arrangements in these respects are often made: the very young, the very old, the mentally or physically ill.

735 F.2d at 833. However, the City is precluded from defending its exlcusionary zoning as rationally related to the foregoing differences. The determination as to the impact of such differences on the ability of mentally retarded persons to live in a group home in a normal residential neighborhood is not a valid function of the City through its delegated zoning powers. As

the discussion in part II above makes clear, that determination lies within the exclusive province of TDMHMR and other State agencies such as Health and DHR.

The authority to exercise zoning functions is delegated by the State to the City for "the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical, cultural, or architectural importance and significance, or the general welfare of the community."[6] TEX. REV.CIV.STAT. art 1011a. Texas courts have interpreted the "health, safety, morals, and ... general welfare of the community" language to mean that: "The basic purpose in all restrictive zoning ordinances is to prevent one property owner from devoting his property to a use which would be *unduly imposed* on the adjoining landowners *in the use and enjoyment of their property.*" Wallace v. Daniel, 409 S.W.2d 184 (Tex.Civ.App. — Tyler 1966, writ ref. n.r.e.) at 189 (emphasis added). Consequently, the disparity between the City's treatment of group homes for the mentally retarded and residential facilities for other special needs populations cannot be premised on differences in the living, care, and educational needs of the mentally retarded. (Indeed, the City ordinance itself does not purport to be concerned with regulating the internal operation or "program" of residential facilities, but only with the impact of each type of property use on the surrounding communi-

---

6. Texas law in this respect is in line with this Court's doctrine regarding the proper role and purpose of local zoning powers. The Texas rule, that a "zoning ordinance must bear a substantial relation to the public health, safety, morals, or general welfare," *Coffee City v. Thompson*, 525 S.W.2d 758 (Tex.Civ.App. — Tyler 1976, writ ref. n.r.e.) at 767, tracks the language of this Court's holding in *Euclid v. Ambler Co.*, 272 U.S. 365 (1926) at 395, the seminal decision on zoning. While that decision permits broad discretion by local zoning authorities to regulate private property, the Court declared: "It is not meant by this, however, to exclude the possibiliy of cases where the general public interest would so outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390. In *Euclid*, this Court reversed a broad injunction against an entire zoning ordinance, without "scrutiniz[ing] its provisions ... to ascertain ... whether there may be ... provisions ... which, if attacked separately, might not withstand constitutional scrutiny." *Id.* at 395. The majority acknowledge "that when .. the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises ... or to particular conditions, ... some of them, or even many of them, may be found to be clearly arbitrary and unreasonable." *Id.*

ty. See J.A. 50.) Rather, the City must come forward with some difference in the adverse impact of group homes for the mentally retarded — as compared to the impact of nursing homes for the aged, tuberculosis sanitariums, halfway houses for youthful offenders, etc. — on the health, safety, morals and general welfare of the community.

Had the City made any effort to articulate a rational relationship between its discriminatory ordinance and a valid governmental purpose of zoning, that rationale still would have to be considered in the context of State public policy. That policy reflects the conclusion that it is in the public interest to encourage group homes for the mentally retarded in normal residential neighborhoods. Thus, as a matter of law, a discriminatory municipal ordinance cannot be found to rationally serve a State interest when that ordinance runs counter to State public policy and declared State interests. See *Zobel v. Williams, supra.*

At trial, the City offered no justification for the disparate treatment by the ordinance on its face and the District Court found none. The justifications offered were only for the denial of a special use permit — not for the requirement that group homes for the mentally retarded seek such a permit while comparable specialized facilities for the non-retarded are not so burdened. (J.A. 95, 103, Finding of Fact no. 34, Conclusion of Law no. 2). The District Court identified seven factors considered by the City.[7] (J.A. 95). Nevertheless, the overriding

---

7. A red herrring issue raised by the City concerned a new rule by the Texas Department of Human Resources limiting the size of subsequently approved private ICF/MRs to six beds each. The proposed ICF/MR group home in this case would contain thirteen beds. Plaintiffs argued that the "six bed rule" was fiscal rather than qualitative and would not apply to the previously approved Cleburne Living Center. The Record supports the Plaintiffs on this point. The undersigned counsel for *Amici* has consulted the appropriate State officials and can inform this Court that the "six bed rule" would not pose an obstacle to the proposed Featherston Street group home at issue in this case. However, of more importance to the legal issues herein, it would not matter if the TDHR rule were to the effect claimed by the City. The very existence of the "six bed rule" only serves to emphasize the point that questions such as how large a group home for the mentally retarded should be are matters for the judgment of State regulators and not the Cleburne City

(Footnote continued on next page)

"but for" factor which motivated the denial of a special use permit was found to be the mental retardation of potential residents of the group home. (J.A. 94, Finding of Fact no. 29). However, without a rational basis, in terms of valid zoning purposes, for distinguishing between residential facilities for the "feeble minded" and those for other special needs populations, the City never should have been in a position to grant or deny a special use permit to the Cleburne Living Center.

CONCLUSION

In view of all the foregoing, *Amici* State of Texas and TDMHMR urge this Court to affirm the decision below, but on the more narrow ground that the challenged City ordinances does not rationally promote any valid governmental objective which the City is pemitted by State law to pursue through its zoning powers.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

J. PATRICK WISEMAN
Chief, State & County Affairs

(footnote continued from previous page)
Council. If, however those State officials should choose to permit the operation of the group home, the City has no authority, *based on the service needs of the mentally retarded,* to second guess the discretionary judgment through its zoning powers. Rather, the City must come forward with some rational basis to believe that thirteen mentally retarded group home residents pose a greater threat to the health, welfare, safety, and morals of the community — i.e., constitute a greater imposition on the adjoining residents' use and enjoyment of their property — than thirteen nursing home residents, paroled felons, tubercular patients, etc.

JAMES C. TODD
Assistant Attorney General

PHILIP DURST
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3131

Counsel for Amici

MOTION FILED

FEB - 2 1985

(19)

No. 84-468

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION AND BRIEF AMICI CURIAE OF

ASSOCIATION FOR RETARDED CITIZENS/USA
ASSOCIATION FOR RETARDED CITIZENS/TEXAS
NATIONAL DOWN SYNDROME CONGRESS
PEOPLE FIRST INTERNATIONAL AND PEOPLE FIRST ORGANIZATIONS OF IOWA, LOUISIANA, MICHIGAN, NEBRASKA, OREGON AND WASHINGTON
UNITED TOGETHER
S.T.A.N.D. TOGETHER
SPEAKING FOR OURSELVES
CONSUMER ADVOCACY BOARD OF THE MASSACHUSETTS ASSOCIATION FOR RETARDED CITIZENS
TEXAS ADVOCATES
WISCONSIN ADVOCATES
CAPITOL PEOPLE FIRST
SELF-ADVOCATES OF CENTRAL NEW YORK

Thomas K. Gilhool*
Frank J. Laski
Michael Churchill
Judith A. Gran
Timothy M. Cook

PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
1315 Walnut St. Rm. 1632
Philadelphia, Pa. 19107
(215) 735-7200
Counsel for Amici Curiae

**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE FOR THE ASSOCIATION FOR RETARDED CITIZENS/USA, *et al.*

Amici respectfully move this Court for an order granting leave to file the attached brief amici curiae on behalf of respondents. Amici are organizations of retarded people and their families and, as such, have a substantial stake in the outcome of this case, *i.e.*, whether they are to be accorded the fullest reach of the Equal Protection Clause. Respondents have consented to the filing of this brief. Amici have requested that petitioners consent, but they have refused to do so.

1. The Association for Retarded Citizens of the United States (ARC/USA) is a national voluntary organization of parents, families and friends of retarded people, as well as of people who are retarded, directed and led since its founding in 1950 by active volunteer parents. The Association is organized into 1,360 local and 48 state-wide chapters, in addition to chapters in United States territories and military installations abroad. The ARC/USA is the national voluntary organization devoted solely to the interests of *all* adults and children who are retarded whatever their race, creed, national origin, residence, etiology or severity of handicap. ARC/USA, which in 1974 changed its name from "Retarded Children" to "Retarded Citizens," was created and exists today "to promote the general welfare of the mentally retarded of all ages everywhere, to encourage the formation of [state and local] associations for Retarded Citizens, [and] to advise and aid parents in the solution of their problems. . . ." (ARC/USA Constitution, § 5). A leading problem that led to the formation of the ARC/USA was to overcome the historical discrimination and prejudice against people who are retarded and to secure a rightful place for them in society. Since its inception, the ARC/USA has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation and abuse of children and adults who are retarded,

in virtually all areas of life. It is the experience of ARC/USA that retarded persons have the capability to enjoy and contribute to the life of the community. To achieve the goal of community living, the ARC/USA has adopted the following official position:

> "Persons with mental retardation of all functioning levels . . . should have access to community residence and services.
>
> "Residential homes should be like others in the neighborhood in terms of size and appearance. They should be dispersed throughout the community, rather than congregated in one neighborhood."

In the experience of the Association, the segregation of persons who are retarded continues to be widely practiced and vigorously defended. The continuing work of the ARC/USA is based upon the reality that, as its official position states: "The fundamental rights of people who are mentally retarded are not yet fully acknowledged or secured, despite the vigorous efforts of advocates to help them achieve the same basic human and constitutional rights as other human beings."

2. The Association for Retarded Citizens of Texas (ARC/Texas) is composed of fifty-five local chapters throughout the state. A non-profit association founded by parents in 1950, like ARC/USA, ARC/Texas has among its official purposes "[t]o insure that persons with retardation are accepted by the public as fully participating members of society and live in conditions most conducive to their optimum development."

The opinions expressed in the record before the City Council of Cleburne and its excluding actions, in the experience of ARC/Texas, arise commonly across Texas. Combatting these exclusionary actions so that retarded people may have a decent and respected place in Texas' communities, constitutes the most substantial and pressing part of the work of ARC/Texas.

3. The National Down Syndrome Congress is a voluntary organization of parents and families of people with Down syndrome. Established as a national organization in 1974, the National Down Syndrome Congress is a network of more than 600 parent groups serving the needs of families in their local communities. Among its official purposes are "[t]o advocate for the realization of the full spectrum of human and civil rights for persons with Down syndrome" and"[t]o address the social policies and conditions that limit the full growth and potential of children and adults with Down syndrome."

People with Down syndrome evoke a quintessential stereotype of retardation, provoking and sustaining a sense of their differentness and danger. The label "mongoloid" was a response to their "facial" difference and supported their official exclusion from common society, which denied their humanity and the reality of their capabilities. *Compare* the view that the "mongoloid" is an atavistic regression to a more backward race, expressed in John Langdon Down, *Observations on an Ethnic Classification of Idiots*, LONDON HOSPITAL CLINICAL LECTURES AND REPORTS 209 (1866), *and in* F. G. CROOKSHANK, THE MONGOL IN OUR MIDST (1924) — a view whose legacy in public opinion and official action amicus seeks to overcome — *with*, *e.g.*, S. M. PEUSCHEL, DOWN SYNDROME: GROWING AND LEARNING (1978), a view amicus seeks to bring to popular and official understanding and action.

4. People First International; United Together; S.T.A.N.D. Together; Speaking for Ourselves; People First of Iowa, Louisiana, Michigan, Nebraska, Oregon and Washington; the Consumer Advisory Board of the Massachusetts Association for Retarded Citizens; Texas Advocates; Wisconsin Advocates; Capitol People First; and Self-Advocates of Central New York are each established and led by persons with retardation. All share a common purpose: to support their members' right to speak for themselves rather

than let others speak for them, to make their own decisions, and to know and exercise their rights as citizens, including the right to live in the community.

People First International was formed in 1974 by former residents of Fairview Training Center who met in Salem, Oregon to discuss forming their own organization. Conversation turned to the selection of a name and someone said, "Why not call ourselves People First, because we want to be known as people before we're known for our handicap." People First International provides support services and advocacy for persons who are retarded and are moving from institutions into the community. People First International members serve on Boards of Directors of other national and state-wide organizations concerned with developmental disabilities, and have testified at a variety of state and local legislative bodies concerning zoning, sterilization, guardianship and other issues.

United Together, a nationwide network of disabled self-advocates, was formed in 1980 at a national conference in Kansas City, Missouri. At that meeting, people with retardation met and talked about the issues *they* considered important: housing, transportation, employment, health care and basic human rights. A group of representatives was elected, one from each of the ten federal regions. Since then the group has organized a national conference that was totally planned and run by people with disabilities and has conducted workshops for professionals, parents, and government agencies.

People First of Iowa, Louisiana, Michigan, Nebraska, Oregon and Washington are each state-wide organizations, formed in 1982, 1983, 1980, 1978, 1983 and 1974, respectively. S.T.A.N.D. together of Maryland, Speaking for Ourselves in Pennsylvania, the Consumer Advisory Board of the Massachusetts Association for Retarded Citizens, Texas Advocates, and Wisconsin Advocates, are each state-wide self-advocacy organizations. Capitol People First is a self-advocacy organization for persons with retardation in central California. Self-Advocates of Central New York was

formed in 1984; most members are former residents of New York State institutions for retarded people now living in the community.

All these organizations have members who have lived in institutions and now live in group homes in the community, and members who still live in institutions but wish to live in the community. Many have suffered from efforts to exclude their group homes from neighborhoods. Policy statements by these organizations on discriminatory zoning legislation and statements by their members on the importance of the right to live in the community are contained in Appendix C to the attached brief.

5. The ordinance at issue in this case is part of a pattern of historic, state-imposed segregation. Overcoming this pattern of discrimination is amici's common goal. Amici are intimately familiar with the prejudice at issue in this case, and provide what they believe to be an important and unique perspective not elsewhere presented, that strict and searching scrutiny should be applied to the ordinance at issue in this case.

For these reasons, this Motion for Leave to File a Brief as Amici Curiae should be granted.

Respectfully submitted,

Thomas K. Gilhool*
Frank J. Laski
Michael Churchill
Judith A. Gran
Timothy M. Cook

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
1315 Walnut Street, Suite 1632
Philadelphia, PA 19107
(215) 735-7200
Counsel for Amici Curiae

February, 1985

*Counsel of record.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE CLEBURNE ORDINANCE IS PART OF A PATTERN OF STATE-IMPOSED LIFE-LONG SEGREGATION OF RETARDED PEOPLE, THAT IN ANIMUS AND PURPOSEFUL UNEQUAL TREATMENT IS PARALLEL TO THE TREATMENT OF BLACK PERSONS	5
II. CLASSIFICATIONS BASED UPON RETARDATION THAT EXCLUDE AND SEGREGATE RETARDED PERSONS ARE SUSPECT AND SHOULD BE GIVEN STRICT AND SEARCHING SCRUTINY	21
A. A History of Purposeful Unequal Treatment Imposed by the State Triggers the Standard for Strict Scrutiny of Legislative Classifications	21
B. Retardation Is an Immutable Characteristic That Has Been Subject to Invidious Classification	22
C. Utilization of a Suspect Standard for Disadvantaging Classifications Will Not Be Fatal to Classifications that Benefit Retarded People	24

TABLE OF CONTENTS—*(Continued)*

Page

D. Cleburne's Exclusion of Retarded People from the Community Is Perverse: It Cannot Be Justified on the Basis of any Characteristic or Need of Retarded People 25

III. THE CONTINUED VIRULENCE OF CLASSIFICATIONS EXCLUDING AND SEGREGATING ON THE BASIS OF RETARDATION REQUIRES THEY BE GIVEN STRICT AND SEARCHING SCRUTINY. 27

CONCLUSION 30

Appendix A. Compendium of Purposeful State Action For the Segregation and Exclusion of Retarded Persons in the Fifty States and the District of Columbia

Appendix B. Texts of the 1947 Zoning Ordinance of the City of Cleburne And the 1929 Zoning Ordinance of the City of Dallas

Appendix C. Statements of Amici Self-Advocacy Organizations

Appendix D. Bibliographical Note on Historical Sources: Eugenics, Race, Retardation, Immigration

TABLE OF AUTHORITIES

Cases:	Page
Ambach v. Norwick, 441 U.S. 68 (1979)	23
Bell v. Maryland, 378 U.S. 226 (1964)	4
Berea College v. Kentucky, 211 U.S. 45 (1908)	19
Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982)	14, 24, 28
Board of Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	3, 24, 28
Buchannan v. Worley, 214 U.S. 60 (1916)	25, 26
Cabell v. Chavez-Salido, 454 U.S. 432 (1982)	23
Columbus Board of Education v. Penich, 443 U.S. 449 (1979)	27
Craig v. Boren, 429 U.S. 190 (1976)	25
Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976)	4, 23, 25
Foley v. Connelie, 435 U.S. 291 (1978)	23
Fullilove v. Klutznick, 448 U.S. 448 (1980)	24
Graham v. Richardson, 403 U.S. 365 (1970)	23
Ingraham v. Wright, 430 U.S. 651 (1977)	4
Loving v. Virginia, 388 U.S. 1 (1967)	24
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	21, 22, 25
Matthews v. Diaz, 426 U.S. 67 (1976)	23
Palmore v. Sidoti, 104 S.Ct. 1879 (1984)	22, 26, 28
Parham v. J.R., 422 U.S. 584 (1979)	22

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Pennhurst State School & Hospital v. Halderman, 104 S.Ct. 900 (1984) 26

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 29

Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972) 14, 28

Plessy v. Ferguson, 163 U.S. 537 (1896) 19

Plyler v. Doe, 457 U.S. 202 (1982) 4, 22, 23, 27

Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 196 (1984) 24

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 21

Schweiker v. Wilson, 450 U.S. 221 (1981) 21

Traux v. Raich, 239 U.S. 33 (1915) 3

Trimble v. Gordon, 430 U.S. 762 (1977) 23

Washington v. Davis, 426 U.S. 229 (1976) 21

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 3

Youngberg v. Romeo, 457 U.S. 307 (1982) 26, 29

State Session Laws:

1917 Ark. Acts 942, §11 3

1907 Tex. Gen. Laws 58 6

1915 Tex. Gen. Laws 143, ch. 90 6

1913 Pa. Laws 494, No. 328, §1 9

1919 Fla. Laws 231, §§1, 8 10

TABLE OF AUTHORITIES—*(Continued)*

State Session Laws: Page

1929 Utah Laws 102, ch. 75, §§1, 29 10

1920 Miss. Laws 288 21

United States Laws:

20 U.S.C. §1401 24

Texas Municipal Codes:

AMARILLO CODE, chs. 26-8, 26-11(43a) 20

BEAUMONT CODE, §42-15(A)(1) 20

CAROLLTON CODE, art. XV(14) 20

COPPERAS COVE CODE, §5(4)(m) 20

DUNCANVILLE CODE, art. III(14) 20

EDINBURG CODE, art. IV, §4-2(3) 20

KILLEEN CODE, ch. 9, art. 2, §8-1(f) 20

MIDLAND CODE, §11-1-10(A) 20

NEW BRAUNFELS CODE, §6C.1-6 20

PORT NECHES CODE, §24-6 20

SAN ANGELO CODE, §33-2-14(b) 20

SULPHUR SPRINGS CODE, art. 6(a) 20

Congressional Reports and Hearings

S. REP. NO. 94-160, 94th Cong., 1st sess. (1975). . . . 29

S. REP. NO. 94-168, 94th Cong., 1st sess. (1975). . . . 14

Institutional Care and Services for Retarded Citizens: Hearing Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Resources, 98th Cong., 1st sess. (1983) 29

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

T. J. ARCHDEACON, BECOMING AMERICAN: AN ETHNIC HISTORY (1983) 16

Baker, *Outcome Equality or Equality of Respect*, 131 U. PA. L. REV. 933 (1983) 4

Barr, *The Imbecile and Epileptic Versus the Taxpayer and the Community*, 29 PROC. NAT'L CONF. CHARITIES & CORRECTIONS 163 (1902) 18

Barr, *State Care of the Feebleminded*, 76 N.Y. MED. J. 1159 (1903) 17

Bellamy, *et al.*, *Habilitation of Severely and Profoundly Retarded: Illustrations of Competence*, 10 EDUC. & TRAINING MENTALLY RETARDED 174 (1975) . 26

B. BLATT & F. KAPLAN, CHRISTMAS IN PURGATORY; A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION 29

Brown, *et al.*, *Toward the Realization of Integrated Educational Environments for Severely Handicapped Students*, 2 REV. AM. ASSN. EDUC. SEVERELY & PROFOUNDLY HANDICAPPED 195 (1977) 26

THE BURDEN OF FEEBLE-MINDEDNESS (1912) 10

Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455 (1984) 4

Christensen, *"Not My Block" Reactions Greet Group Homes*, Dayton Daily News, Mar. 18, 1984 29

Dallas Morning News, Jan. 7, 1985, at 17A, col. 1 .. 6

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

Defective Babe Dies As Decreed: Physician, Refusing Saving Operation, Defends Course as Wisest for Country's Good, Watches as Imbecile Child's Life Wanes, N.Y. Times, Nov. 18, 1915, at 1, col. 3 14

THE FEEBLE-MINDED, OR, THE HUB TO OUR WHEEL OF VICE (1913) 10

Finley, *Arson Hits House Planned for Retarded*, Detroit News, Apr. 30, 1982 29

FIRST ANNUAL REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF TEXAS (1921) 6, 7

Ford, *2d Home for Retarded is Set Ablaze*, Detroit Free Press, Dec. 5, 1980 29

J. H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (5th ed. 1980) 17

G. M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971) 17

Goddard, *Four Hundred Feeble-Minded Children Classified by the Binet Method*, 15 J. PSYCHO-ASTHENICS 13 (1910) 5

H. H. GODDARD, THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLEMINDEDNESS (1912) 15

Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQUENCY 243 (1917) 16

G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS (1980) 24

Other Authorities: Page

J. S. HALLER, OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900 (1971) 16

M. H. Haller, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT (1963) 15

O. HANDLIN, THE UPROOTED (2d ed. 1973) 16

A. B. HART, THE SOUTHERN SOUTH (1910) 17

Hentoff, *The Awful Privacy of Baby Doe*, ATLANTIC, Jan., 1985 29

J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (1978) 16

Horner & Bellamy, *Structured Employment: Productivity and Productive Capacity*, in VOCATIONAL HABILITATION FOR SEVERELY HANDICAPPED PERSONS (1979) 26

L. KAMIN, THE SCIENCE AND POLITICS OF I.Q. (1974) 15

Johnson, *Report of the Committee on Colonies for Segregation of Defectives*, 30 PROC. NAT'L CONF. CHARITIES & CORRECTIONS (1903) 18

Karst, *The Supreme Court, 1976 Term — Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) 4

Keating, *The War Against the Mentally Retarded*, N.Y. MAG., Sept. 17, 1979, at 87 29

Kevles, *Annals of Eugenics*, NEW YORKER, Oct. 8, 1984, Oct. 15, 1984, Oct. 22, 1984 15

R. KLUGER, SIMPLE JUSTICE (1975) 17, 18, 19, 20

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

Kuhlman, *Degree of Mental Deficiency in Children As Expressed by the Relation of Age to Mental Age*, 17 J. PSYCHO-ASTHENICS 132 (1913) 5

Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons*, 13 GONZAGA L. REV. 625 (1978) 29

K. M. LUDMERER, GENETICS AND AMERICAN SOCIETY; A HISTORICAL APPRAISAL (1972) 15

THE MENACE OF THE FEEBLE-MINDED IN CONNECTICUT (1915) 10, 16, 17

THE MENACE OF THE FEEBLE-MINDED IN PENNSYLVANIA (1913) 10

"THE NEGRO A BEAST": OR "IN THE IMAGE OF GOD" (1900) 17

THE NEGRO: A MENACE TO AMERICAN CIVILIZATION (1907) 17

Alien Defectives, N.Y. Times, Jan. 13, 1913, at 10 .. 16

I. A. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA (1965) 17

Osborn, *The Evolution of Human Races*, 26 NAT. HIST. 5 (1926) 17

R. PERSKE, NEW LIFE IN THE NEIGHBORHOOD (1980) 27

PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE LEADING EDGE, SERVICE PROGRAMS THAT WORK: REPORT TO THE PRESIDENT (1978) 27

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, MENTAL RETARDATION, PAST AND PRESENT (1977) 30

PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED WORKER, AN ECONOMIC DISCOVERY: REPORT TO THE PRESIDENT (1983) 26

PROCEEDINGS OF THE TEXAS CONFERENCE ON CHARITIES AND CORRECTIONS (1912) 7

PROCEEDINGS OF THE TEXAS CONFERENCE ON CHARITIES AND CORRECTIONS (1914) 18

D. & S. ROTHMAN, THE WILLOWBROOK WARS (1984) 29

S. B. SARASON & J. DORIS, EDUCATIONAL HANDICAP, PUBLIC POLICY AND SOCIAL HISTORY (1979) 15

S. B. SARASON & J. DORIS, PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY (4th rev. ed. 1969) 15

R. E. SMITH, CHRISTIANITY AND THE RACE PROBLEM (1922) 20

K. M. STAMPP, ERA OF RECONSTRUCTION (1965) 16

A. H. STONE, STUDIES IN THE AMERICAN RACE PROBLEM (1908) 20

P. TYOR, SEGREGATION OR SURGERY: THE MENTALLY RETARDED IN AMERICA, 1850-1920 (diss. Nw. Univ. 1972), *published in* P. TYOR & L. BELL, CARING FOR THE RETARDED IN AMERICA: A HISTORY (1984) 15, 18

TABLE OF AUTHORITIES—*(Continued)*

Other Authorities: Page

Wald, *Basic Personal and Civil Rights*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW (M. Kindred, *et al*. eds. 1976) 14

Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Phila. Inquirer Mag., May 27, 1984 27

C. V. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974) 6, 17, 18, 19

C. S. YOAKUM, CARE OF THE FEEBLEMINDED AND INSANE IN TEXAS, BULLETIN OF THE UNIVERSITY OF TEXAS, NO. 369 (Humanistic Ser. No. 16, Nov. 5, 1914) 7, 19

No. 84-468

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,

Petitioners,

v.

CLEBURNE LIVING CENTER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE ASSOCIATION FOR RETARDED CITIZENS/USA, *et al.*, AS AMICI CURIAE

INTEREST OF AMICI

Amici are eighteen national, state and local organizations of retarded people and their families interested in disestablishing the regime of state-imposed exclusion of retarded people from the communities of this nation.

Amici know the history of purposeful unequal treatment imposed upon retarded people by the states and know, as well, that the ordinance at issue here is part of that terrible history. Amici have a direct, personal interest in securing for retarded persons the full measure of equal protection. Thus, amici present this brief on behalf of respondents not only to argue that the Cleburne ordinance must fall, but also to present the history that compels

the view that the Court should apply strict and searching scrutiny to the ordinance and other disadvantaging classifications that exclude and segregate retarded people.[1]

SUMMARY OF ARGUMENT

This case concerns the *de jure* exclusion of thirteen retarded citizens from the community of Cleburne because they happened to be retarded. This quite invidious exclusion has been visited upon these citizens and others like them as a direct result of a pattern of official action, historically, of each of the state governments.

Texas, along with every other state, adopted a policy of segregating and isolating "feeble-minded" people for life, preventing their remaining "at large" in the community. The states forthrightly and systematically sought to "purge society" of their retarded citizens and by law declared them "unfit for citizenship."

The Cleburne ordinance, modeled on a 1929 Dallas ordinance, has its origin in this period and—along with at least twelve similar ordinances in Texas alone—is rooted in the invidious discrimination of that time.

The compelled segregation and isolation of—and pure animus toward—retarded people, clothed in the full weight, strength, and authority of the government, dictates the strictest, most searching scrutiny of official action excluding those citizens. Only by invoking strict scrutiny can the stereotypes (such as those in evidence here) be separated from the facts, thereby enabling the Court to determine whether the classification directed solely at retarded persons is a fair one.

The classification we seek to have held suspect is not "intelligence," but that of "being retarded," for it is that immutable trait that is at the root of the "history of purposeful unequal treatment." Strict scrutiny will not foreclose classifications of retarded persons for proper purposes or that properly recognize their differences.

---

1. The interest of each amicus is fully set forth in the accompanying motion.

ARGUMENT

The ordinance of the City of Cleburne excluding "homes . . . for the feebleminded"[2] from the mid-Texas town of 20,000 people has its roots in the most xenophobic era of our history, 1896 to 1930, when both Jim Crow statutes segregating people by race and state statutes imposing life-long segregation upon "the feebleminded" were formulated and systematically enacted by the states. Unlike the legacy of race discrimination in this country, however, *compare, e.g., Board of Regents of the University of California v. Bakke*, 438 U.S. 265, 387-94 & n.1 (1978) (Marshall, J.), the history of discrimination on the basis of retardation is not widely known. Yet the Court cannot decide this case without a full appreciation of that history. Amici's major reason for filing this brief is to place the history before the Court and to argue that that history is dispositive of this case.

This case poses the question of the respect required by the Equal Protection Clause to be accorded retarded people: what degree of scrutiny and justification is required of official classification that excludes, segregates, degrades and isolates retarded people. Amici submit that in light of the extraordinary history of purposeful unequal treatment, the proper standard to be extended under the Equal Protection Clause to retarded people is that heretofore accorded people who are black.

The classification here—part of the historical pattern of state action to eliminate retarded people altogether from common society and to disassociate "them" from "us"—offends the Equal Protection Clause at what the Court's opinions[3] from the begin-

---

2. "Feebleminded" was the encompassing term pervasively used in the early decades of this century to designate retarded people as such, including the "moron" (mildly retarded people), the "imbecile" (moderately retarded people) and the "idiot" (severely or profoundly retarded people). *See, e.g.*, 1917 Ark. Acts 942, §11.

3. *E.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself"); *Traux v. Raich*, 239 U.S. 33, 41 (1915) ("right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it is the purpose of the [Four-

ning to now show to be its core:

> "The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who 'belongs.' Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a non-participant."[4]

Classifications that explicitly single out retarded people and have exclusive impact on them should be considered suspect and given strict and searching scrutiny in view of the terrible history of such classification.[5]

---

teenth] Amendment to secure"); *Bell v. Maryland*, 378 U.S. 226, 317 (1964) (concurring opinion) ("constitutional right of all Americans to be treated as equal members of the community with respect to public accommodations . . . 'is too important in our free society to be stripped of judicial protection' "); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 604 (1976); *Ingraham v. Wright*, 430 U.S. 651, 670 (1977); *cf. Plyler v. Doe*, 457 U.S. 202, 223 (1982) (". . . the ability to live within the structure of our civic institutions, and . . . contribute . . . to the progress of our Nation").

4. Karst, *The Supreme Court, 1976 Term — Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977); *accord*, Baker, *Outcome Equality or Equality of Respect*, 131 U. PA. L. REV. 933 (1983); Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L. J. 455, 490-500 (1984).

5. The dissent from the denial of rehearing en banc below thought "the retarded" to have "minds at or below third-grader level in the bodies of otherwise healthy adults" (J.A. 141). This manifestly incorrect statement of what being retarded is repeats a persistent part of the stereotype that evoked the official state undertaking to segregate retarded people: the myth of "mental age," that retarded people are eternal children, innocent but fitful, erratic, unreachable, fearsome, forever possessed of a "mental age" of eight (or, five, or three), condemned to wander the world only with what an eight-year old would have learned. Correctly understood, mental age describes *not* a *ceiling* on how much a person can learn or the skills he has command of, but a rate of learning.

Thus, for example, retarded people chronologically aged forty-five who are said to have a mental age of eight will — if the opportunities to learn are decently at hand, have mastered much more during the thirty-seven additional years they have been learning at the eight-year-old "rate" than someone who was eight only for a year. Indeed, H. H. Goddard, who in 1910 "validated" the concept of "mental age" and introduced this "measurement" into American

I. THE CLEBURNE ORDINANCE IS PART OF A PATTERN OF STATE-IMPOSED, LIFE-LONG SEGREGATION OF RETARDED PEOPLE THAT IN ANIMUS AND PURPOSEFUL UNEQUAL TREATMENT IS PARALLEL TO THE TREATMENT OF BLACK PERSONS.

The decades at the turn into this century imposed a stark legacy upon the country. The xenophobic hysteria of the era, fueled by the new scientism of the eugenics movement, possessed by severe Darwinian strictures and doubts, assaulted by the unprecedented flow of new immigration and the uncertainties of a new industrial age, took on all the force of state power and focused it pervasively against black people and against retarded people and visited upon them the most severe disqualifications imaginable among citizens.

---

discourse met "this very difficulty at the outset":

> "We soon realized that having in one of these groups that test to the mentality of say an eight-year-old normal child, we were facing a very interesting problem, as to what was the difference between children who had lived in the world twelve years, and those who had lived twenty years . . . . In other words, a child who tests according to the Binet test, ten years of age, but is actually fifty years old, may be expected to do a great many things which will quite surprise us because we never have happened to know of a ten-year-old child that could do those things . . . ."

Goddard's solution to the measurement difficulty?

> "[I]n order to get some accurate idea as to what mental age meant . . . , we had to cut out all those who were beyond the training period [*i.e.*, those over twenty years]."

Thus Goddard "validated" — and the Era installed and perpetuated in the common prejudice — a measure that does not measure. Goddard, *Four Hundred Feeble-Minded Children Classified By the Binet Method*, 15 J. PSYCHO-ASTHENICS 13 (1910). Others made the point, for example, Kuhlman, *Degree of Mental Deficiency In Children As Expressed By The Relation of Age To Mental Age*, 17 J. PSYCHO-ASTHENICS 132 (1913):

> "Feeble-mindedness is a retarded *rate* of mental development. The term 'arrested development' or 'mental arrest' is a misnomer, for it implies that development has ceased. It is a common observation that feeble-minded children do develop mentally. We also find that their mental ages as measured by the Binet-Simon tests increase as they grow older."

But it is the "ceiling" idea of "mental age" that was codified into invidious

The Jim Crow system segregating people by race was not a 19th century invention, but a creation of this era. C. V. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974). Similarly, large, isolated institutions that separate retarded people from the wider society for life are an invention of this era. Like Jim Crow, these institutions were created by state law *intentionally* to *segregate* retarded people. Thus a regime of state-imposed life-long segregation of retarded people was commissioned, and public, as well as private, attitudes and action that would reinforce it were legitimated and evoked.[6] This case will determine whether it shall be disestablished.

In Texas, Jim Crow was enacted and in force in the first decade of this century.[7] Texas created its first institution "for the feeble-minded" of the State by Act of March 22, 1915.[8] Section 2 of the Act declared as its purpose to end "the heavy economic and moral losses arising from the existence at large of these unfortunate persons." The Superintendent of the State Colony for the Feeble-Minded reiterated its purposes in his Third Annual Report:

> "[T]heir segregation and control, through life, is the remedy. This can be obtained only by legally committing them to an institution where they can be kept permanently."[9]

---

stereotype, to wit: The January 7, 1985 *Dallas Morning News* (17A, col. 1) opened a six-column feature story with lead paragraphs saying:

"Sarah is three years old — forever.

"She was born 26 years ago, but something went wrong, and her mind stopped growing at the mental age of three."

6. The exclusion in the Cleburne ordinance at issue here did not first appear in the Cleburne zoning ordinance in 1965 as petitioners have incorrectly asserted throughout. The exclusion of "feeble-minded patients" appeared first in the Cleburne ordinances in 1947. It was taken verbatim from the September 11, 1929 ordinance of the City of Dallas. The relevant portions of both ordinances are reproduced at Appendix B.

7. *See, e.g.*, 1907 Tex. Gen. Laws 58.

8. "An Act to Provide for the Establishment and Maintenance of a State Farm Colony for the Feeble-Minded and to Make Appropriations Therefore, and to Declare an Emergency." 1915 Tex. Gen. Laws 143, ch. 90.

9. *Superintendent's Report* (August 31, 1920) in FIRST ANNUAL REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF

The animus of the Act creating the State Colony to segregate retarded people is set forth in a 1914 pamphlet of the Texas State Conference on Charities and Corrections.[10] The pamphlet opens:

> "Every state, to maintain the highest efficiency in its governmental and social functions, must consider the nature of its citizens. We are in the habit of dividing citizens into two classes based on their value to society or their amenableness to social custom and law — desirable and undesirable citizens. The latter class comes in conflict with law and is generally considered a menace to good government." *Id.* at 11.

It continues:

> "The general public has already been educated to the belief that it is a good thing to segregate the idiot or the distinct imbecile, but they have not, as yet, been quite so fully convinced as to the proper treatment of this brighter and more dangerous class, the defective delinquent. From a financial standpoint, segregation of the defective delinquent would be a great economy, to say nothing about the more salient feature, that of stopping them from producing their kind. If we could segregate these defectives when they are young and keep them confined during their natural lives, it would

---

THE STATE OF TEXAS 147 (1921) (Docs. Coll. Tex. St. Archives).

10. C.S. YOAKUM, CARE OF THE FEEBLEMINDED AND INSANE IN TEXAS, BULLETIN OF THE UNIVERSITY OF TEXAS, NO. 369 (Humanistic Ser. No. 16, Nov. 5, 1914) (on file in Pamph. Coll., Tex. St. Archives, Austin, Tex.). The pamphlet originated as a committee report of the State Conference on Charities and Corrections, which, like conferences in other states and the National Conference on Charities and Corrections, was composed of leading citizens, most often drawn from the leading families — professors, journalists and public officials, including mayors and legislators — and was the active progenitor of the Act of March 22, 1915, as it had been of the juvenile court law, the suspended sentence law and other Progressive Era legislation.

> "It aims to bring together for a free exchange of views and experiences for united action all persons and all organizations and institutions, public and private, engaged or interested in work of a charitable or philanthropic character, or in administering our penal and correctional institutions and agencies."

PROCEEDINGS OF THE STATE CONFERENCE ON CHARITIES AND CORRECTIONS 11-12 (1912) [hereinafter cited as PROCEEDINGS].

obviate the expense of having them committed repeatedly to our penitentiaries when they grow older. . . .

" 'Some may say, "Why it is a pity to confine these children in an institution all their lives"; but that is where they are greatly mistaken, as for instance, in Ohio, I can say to you that we have a community of over 1600 of the happiest children in the State in our institution.' . . . . " *Id.* at 46.

The pamphlet goes on to warn:

" 'To discharge, unsterilized, the defective child, after having taught him habits of neatness and a few tricks that make his mental deficiency less noticeable, is worse than never to have put him in an institution.' In other words, the defective is a person who, for the good of society, must end his line of descent with himself. We have indicated in other places that he is personally a menace to society while alive.

"The only safe procedure is custodial care and institutional care throughout life for the great majority. Some authorities believe that a small percentage of those who are trainable may after a time be returned to society. Even these are usually far better off in an institution where they can earn a living under watchful care. In the paragraphs that follow, we shall describe the type of institution that is best suited to such lifelong protection of these derelicts in society." *Id.* at 66.

The pamphlet concludes:

"A clean-limbed, pure-minded, sane thinking people is an ideal alone commensurate with the ideals of this State and this nation. What shall we do to attain, to eliminate this great and ever-increasing source of ignorance, poverty, and crime? 'One of the most shocking and easily cured evils is the increase of the feeble-minded, the begetters of numerous degenerate children. The remedy is their segregation by the State . . .' The answer comes with no uncertain ring.

"This problem of racial betterment is called in modern phrase, eugenics. Our purpose in this discussion has been limited. We have, therefore, discussed the single phase of

> the general problem — the elimination of the defective strains. Many answers and solutions have been offered, among them segregation has appealed to society's feelings of humanity and fair play with greatest force. Restrictive marriage laws and customs are important, and educative, but fail to reach the irresponsible and degenerate till too late. . . . Laissez-faire or natural selection, euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present-day ideals of religion and humanity. Of all the solutions suggested, the two most advocated are sterilization and segregation. Both of these ideas were embodied in bills submitted to the last Legislature in Texas.
>
> "The evidence so far collected points toward *segregation* as the most feasible, most easily put into force, and least subversive of constitutional prerogative. . . ." *Id.* at 81-83 (pamphlet's emphasis).[11]

This Texas undertaking by force of law of the life-long segregation of retarded persons was universal among the states.[12] Each of the states resolved, *de jure*, *as did Pennsylvania*:

> "that the Eastern Pennsylvania State Institution for the Feeble-Minded and Epileptic shall be devoted to segregation, care, maintenance, treatment, training and education of epileptic, idiotic, imbecile or feeble-minded persons,"

1913 Pa. Laws 494, No. 328, § 1; and *as did Florida*:

> "that there is hereby established . . . a Florida Farm Colony for Epileptic and Feeble-Minded . . . for the segregation and employment of the epileptic and feeble-minded . . . to the end that these unfortunates may be prevented from reproducing their kind, and the various communities and the

11. A second, separate section of the Texas pamphlet, addressing care of "the insane" (*id.* at 84-145), reflects confusion of the two (109-128), but nowhere calls for, but rather rejects (100, 136-37) permanent, life-long segregation of mentally ill people.

12. *See* Appendix A, Compendium of Purposeful State Action for the Segregation and Exclusion of Retarded People in the Fifty States and the District of Columbia [references to App. A hereinafter cited as "A-____"].

> State at Large relieved from the heavy economic and moral losses arising by reason of their existence,"

1919 Fla. Laws 231, §§ 1, 8; and *as did Utah*, in the same year the predecessor to the Cleburne ordinance was enacted, 1929 Utah Laws 102, ch. 75, §§ 1, 29 (App. A-71.).

The animus of each was everywhere the same. A sampling from Appendix A of the very titles recurrent among the many pamphlets advancing institutional segregation describes vividly that ill-will: *The Menace of the Feeble-Minded in Pennsylvania* (1913); *The Menace of the Feeble-Minded in Connecticut* (1915); *The Burden of Feeble-Mindedness* (1912) (Mass.); *The Feeble-minded, Or, The Hub to Our Wheel of Vice* (1913) (Ohio).

The policy of exclusion of retarded people, implemented through state action, is epitomized by a Mississippi law creating a "Colony for the Feebleminded" for the segregation of "all cases" deemed "*unfit for citizenship.*"[13] That law, and the others like it, present as starkly as imaginable the essence of an equal protection violation, exclusion of a particular people from the very "*citizenship*" of the land. Government officials in every state established formal policies in inexorable fashion: Retarded people were "entirely unfit to go into general society,"[14] a "menace to the happiness . . . of the community,"[15] "unfitted for companionship with other children,"[16] a "blight on mankind"[17] whose very "presence"[18] in the community was "detrimental to normal" people,[19] and whose "mingling . . . with society" was "a most baneful evil."[20]

Official policy was to "prevent this class of persons from coming in contact with the populace,"[21] to "purge society"[22] of these

13. A-47 (emphasis provided); *see also* A-19 (Pa.).
14. A-43 (Wis.); *see* A-24 (Ind.) ("unfit to be out in the world").
15. A-44 (Ala.).
16. A-74 (Wash.).
17. A-21 (Vt.).
18. A-21 (R.I).
19. A-63 (Cal.).
20. A-70 (Ore.).
21. A-67 (Colo.).

"anti-social beings,"[23] to "segregate [them] from the world,"[24] so that they "not . . . be returned to society"[25] since "[m]ental defect . . . wounds our citizens a thousand times more than any plague."[26] "Nothing" would better "promot[e] our best citizenship, than to segregate the feeble-minded."[27]

To that end, the enactments of nine state legislatures specified "segregation" in the body of their laws[28] and the official documents of practically each other state and of the United States for the District of Columbia specified the same object.[29]

Institutions, as a matter of law, were houses of "detention"[30] where retarded "inmates" were "kept"[31] and "held"[32] "for life."[33] As the official reports indicate, detention would be "permanent,"[34] in the nature of "an indeterminate sentence"[35] to the "institutional community where he'll always live,"[36] since "a defective child will be a defective adult, and will die a defective. There is not a philosopher's stone to turn the base metals of defect into gold."[37] They could never be let "loose in the world,"[38]

22. A-43 (Wis.).

23. A-19, 20 (Pa.).

24. A-23 (Ind.).

25. A-34 (Neb.).

26. A-73 (Utah).

27. A-21-22 (Vt.).

28. A-45 (Fla.); A-29 (Ky.); A-47 (Miss.) ("isolation and segregation"); A-35 (Neb.) ("to segregate them from society"); A-9 (N.H.); A-19 (Pa.); A-38 (S.Dak.); A-57, 59 (Va.); A-74 (Wash.).

29. *E.g.*, A-66 (Cal.); A-67 (Colo.); A-2 (Conn.); A-27 (Kan.); A-23 (Ind.); A-8 (Mass.); A-31 (Mich.); A-10 (N.J.); A-18 (N.Y.); A-49 (N.Car.); A-37 (Ohio); A-50-51 (S.Car.); A-56 (Tex.); A-73 (Utah); A-22 (Vt.); A-43 (Wis.) ("separating them from society"); A-77-78 (U.S.).

30. *E.g.*, A-22 (Ill.); A-69 (Mont.); A-34 (Neb.); A-37 (Ohio); A-71 (Ore.); A-20 (Pa.).

31. A-11 (N.J.)

32. A-62 (Ariz.)

33. A-62 (Cal.); *see* A-1 (Conn.); A-35 (N. Dak.)

34. A-8 (Mass.); A-33 (Mo.); A-10 (N.J.); A-19 (Pa.); A-56 (Tex.); A-77 (U.S.).

35. A-59 (Va.); *see* A-67 (Colo.) (to be "kept in an institution indefinitely"); A-71 (Ore.) "indeterminate detention").

36. A-43 (Wis.).

37. A-46 (Ga.).

and it was felt especially important to keep them "away from thickly settled communities,"[39] "remote from the centers of population for reasons that are obvious."[40] Retarded persons simply did not have the "rights and liberties of normal people."[41] The Executive Secretary of the District of Columbia Board of Charity urged a congressional committee to authorize the erection of an institution since retarded people are "not much above the animal."[42] State officials elsewhere also sought to remove retarded people from the realm of humanity, referring to them as "not far removed from the brute."[43] They were not quite persons, but "by-products of unfinished humanity."[44]

Retarded people were segregated for being a "nuisance to the community,"[45] or a "menace to the happiness . . . of others in the community,"[46] or a "menace to society,"[47] or "for the welfare of the community"[48] or "of society,"[49] or so that "the state at large [may be] relieved from the heavy economic and moral losses arising by reason of their existence."[50] It was important to find a "way of getting rid of these kinds of cases."[51]

Official reports labeled retarded people "a parasitic, predatory class,"[52] a "danger to the race,"[53] "a blight and a misfortune both to themselves and to the public,"[54] whose role "in discount-

---

38. A-67 (Colo.).
39. A-79 (U.S.).
40. A-2 (Conn.).
41. A-41 (S.Dak.).
42. A-80.
43. A-58 (Va.).
44. A-53 (Tex.).
45. A-22 (Ind.).
46. A-44 (Ala.); A-46 (Ga.); A-47 (Miss.); A-51 (Tenn.); A-60-61 (W.Va.).
47. A-68-69 (Idaho); A-43 (Wis.); A-72 (Utah) ("a social menace").
48. A-62 (Ariz.); A-22 (Ill.); A-47 (La.); A-70 (N.Mex.); A-80-81 (U.S.).
49. A-35 (Neb.).
50. A-45 (Fla.); *accord*, A-55-56 (Tex.).
51. A-3 (Conn.); *see* A-68 (Hawaii) ("a place to get the feeble-minded out of the community").
52. A-8 (Mass.); A-21 (Vt.).
53. A-43 (Wis.).
54. A-27 (Kan.).

ing social progress is by far the most potent influence for evil under which society is struggling today."[55]

The states actively inculcated fear of retarded persons, directed their identification and removal from the community, and enlisted assistance of the public to do so. Government officials undertook major outreach efforts.[56] Physicians, teachers, and social workers were required by law in some states to report to the government all persons "believed by them to be feeble minded."[57] Other states made it "one of the special duties of every health officer and of every public health nurse to institute proceedings to secure the proper segregation and custody of feebleminded persons."[58] Those states with no formal reporting or registration requirement at least officially encouraged health, welfare, and social workers to be "constantly on the lookout"[59] for potential cases to be institutionalized, and authorized a wide variety of public and private persons[60] —or sometimes simply "any reputable citizen"[61]—to institutionalize a person if a parent or relative "either neglect[ed] or refus[ed]" to do so.[62] Washington state legislators dispensed with that procedure and simply made it a criminal offense, punishable by a $200 fine, for any parents refusing to perform their "duty" to segregate in the state institution their "feebleminded" son or daughter.[63] Some states even permitted detention temporarily with no procedural rights for those who were "suspected of being feebleminded or idiotic."[64] Once parents placed their child in an institution, some states required them to "waive all right to remove such inmate there-

55. A-24 (Ind.).

56. *E.g.*, A-62-63, 65-66 (Cal.); A-25 (Ind.); A-56 (Tex.).

57. A-40 (S.Dak.); *see also* A-71 (Ore.).

58. A-29 (Ky.); *accord*, A-52 (Tenn.).

59. A-28 (Kan.).

60. *E.g.*, A-66 (Cal.) ("any peace officer"); A-49 (N. Car.) ("ministers, teachers, or physicians); A-50 (Okla.) ("trustees of any township"); A-21 (Vt.) (the "selectman of [any] town"); A-75 (Wyo.) (the county prosecutor).

61. A-5 (Del.); A-22 (Ill.); A-46 (La.); A-51 (Tenn.); A-61 (W.Va.).

62. A-47-48 (Miss.); A-51 (Tenn.); A-61 (W.Va.); *see* A-44 (Ala.) ("notwithstanding the family or relatives may object thereto"); A-50 (Okla.).

63. A-74.

64. *E.g.*, A-36 (N.Dak.).

after either permanently or for a limited time."[65] All of these steps, and others, were thought necessary to segregate those "whose parents or guardians are averse to such actions."[66] Government officials made the judgment that "the presence of the unfortunate child in the home"[67] was "more tragic than any known disease,"[68] and a "menace to . . . the family."[69]

The regime of segregation reached to and was reinforced by systematic exclusion from public schooling,[70] forced sterilization,[71] peonage,[72] bans upon marriage and exercise of the franchise,[73] and even reached to the death of "defective" babies.[74]

Where did it all come from? Previously, in the mid-19th century, Dr. Samuel Gridley Howe and others had established residential schools for retarded people, all small, in or near the towns, with the purpose that retarded children should attend, learn, and return after a little while to their homes to live and to work. Howe insisted that the schools should not become custodial and warned against life-long segregation.[75] By the turn into

65. A-30 (Mich.); A-11 (N.J.); *accord*, A-69 (Mont.); A-36 (N.Dak.).

66. A-66 (Cal.); *accord*, A-34 (Neb.) (need for retarded people to be "detained in the institution against the desire of the parent").

67. A-21 (R.I.).

68. A-73 (Utah).

69. A-63 (Cal.); A-6 (Md.).

70. The history of exclusion from the schools is noted in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294-95 (E.D. Pa. 1972); *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 191(1982); and committee reports on the Education of All Handicapped Children's Act, *e.g.*, S. REP. NO. 94-168, 94th Cong., 1st sess. 9 (1975).

71. *E.g.*, A-63-64 (Cal.); A-26 (Iowa); A-5 (Me.); A-59-60 (Va.).

72. *E.g.*, A-3,4 (Conn.); A-81 (D.C.). Indiana required by law that "the labor in constructing" all of the institution's "buildings, improvements, and facilities shall be supplied as far as possible by the persons committed to the institution." A-24.

73. *See* Brief of Amici AAMD, *et al.*; Wald, *Basic Personal and Civil Rights* in PRESIDENTS COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 3, 7-9, 25 (M. Kindred, *et al.*, eds. 1976).

74. *Defective Babe Dies As Decreed: Physician, Refusing Saving Operation, Defends Course as Wisest for Country's Good, Watches as Imbecile Child's Life Wanes*, N.Y. Times, Nov. 18, 1915, at 1, col. 3.

75. For Howe's position, see pp. A-6-7.

the new century, however, the times had changed. In 1903 Walter Fernald, a Massachusetts official and a leading figure in the Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons, dismissed Howe's view, saying:

> "[T]he Doctor wrote before the tide of immigration had set so strongly to our shores. . . . What is to be done with the feeble-minded progeny of the foreign hordes that have settled and are settling among us?"[76]

A solution equal to the severity and the magnitude of the problem was imperative. In 1913-14, at the request of the United States Public Health Service, Henry H. Goddard — the acclaimed author of *The Kallikak Family* [77] — administered Binet's IQ test to the southern and eastern European immigrants arriving in steerage at Ellis Island. "[G]iv[ing] the immigrant the

---

76. P. TYOR, SEGREGATION OR SURGERY: THE MENTALLY RETARDED IN AMERICA, 1850-1920, at 160 (Diss. Nw. Univ. 1972), *published in* P. TYOR & L. BELL, CARING FOR THE RETARDED IN AMERICA: A HISTORY (1984). The standard historical works on America's treatment of retarded people include P. TYOR, *supra*; S. B. SARASON & J. DORIS, PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY, chs. 12-16 (4th rev. ed. 1969), and EDUCATIONAL HANDICAP, PUBLIC POLICY AND SOCIAL HISTORY (1979); *see also* Appendix D to this Brief.

77. THE KALLIKAK FAMILY (MacMillan, 1912). Asking "What is to be done?" *The Kallikak Family* concludes:

> ". . . For the low-grade idiot, the loathsome unfortunate that may be seen in some of our institutions, some have proposed the lethal chambers. But humanity is steadily tending away from the possibility of that method. . . "We cannot successfully cope . . . until we recognize feeble-mindedness and its hereditary nature, recognize it early, and take care of it.
>
> "[S]egregation through colonization seems in the present state of our knowledge to be the ideal and perfectly satisfactory method."

Id. at 101, 116-117. The leading standard historical works describing the pervasive place of eugenics in the era and its decisive role in action against immigrants, blacks and retarded people include M. H. HALLER, EUGENICS: HERIDITARIAN ATTITUDES IN AMERICAN THOUGHT (1963); K. M. LUDMERER, GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPRAISAL (1972); L. KAMIN, THE SCIENCE AND POLITICS OF I.Q. (1974); Kevles, *Annals of Eugenics*, NEW YORKER, Oct. 8, 1984, at 99-115; *id.* Oct. 15, 1984, at 99-125; *id.* Oct. 22, 1984, at 92, 93.

benefit of every doubt," he found that 79% of the Italians, 80% of the Hungarians, 83% of the Jews and 87% of the Russians were feeble-minded.[78]

This was — as Kenneth M. Stampp writes in his historiographical analysis of this early 20th Century era — "a time when xenophobia had become almost a national disease." It was a time "when Negroes and immigrants were being lumped together in the category of unassimilable aliens." During the first decades of the century,

> "the new immigrant groups had become the victims of cruel racial stereotypes. Taken collectively it would appear that they were, among other things, innately inferior to the Anglo-Saxons in their intellectual and physical traits, dirty and immoral in their habits, inclined toward criminality, receptive to dangerous political beliefs and shiftless and irresponsible. In due time, those who repeated these stereotypes awoke to the realization that what they were saying was not really very original — that, as a matter of fact, these generalizations were *precisely* the ones southern men had been making about Negroes for years."[79]

And the solution for the now apprehended "common problem" was, in the new decades of a new century, precisely similar: state-imposed segregation alike of "the Negro" and of retarded people.

The animus that supported segregation of "the feeble-minded" bore unmistakable similarity to the animus that evoked Jim Crow. *Compare* titles like *The Menace of the Fee-*

---

78. Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQUENCY 243, 249, 252 (1917). Additional "findings" were extensively reported, *e.g.*, N.Y. Times, Jan. 13, 1913, at 10 ("*Alien Defectives*"); *see* A-12-16, 64-65.

79. K. M. STAMPP, *The Tragic Legend of Reconstruction*, the introduction in ERA OF RECONSTRUCTION 19-20 (1965) (Stampp's emphasis).

The standard historical works on the response of the era to immigration, describing its crucial contribution to the adoption of Jim Crow and its identification of new immigrants as so fearfully subhuman as to require state action, include T. J. ARCHDEACON, BECOMING AMERICAN: AN ETHNIC HISTORY 158-172 (1983); J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 131-175 (1978); O. HANDLIN, THE UPROOTED 247-267 (2d ed. 1973); *see also* J. S. HALLER, OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900, at 170-175 (1971).

bleminded in Connecticut (1915) *with* such popular southern works advancing Jim Crow as *"The Negro a Beast": Or "In the Image of God"* (1900); *The Negro: A Menace to American Civilization* (1907). They were, alike, "a part of the then current literature of the 'Yellow Peril' school and the flourishing cult of Nordicism."[80]

Champions of life-long segregation for retarded people explicitly invoked the then-exploding prejudice against black people. For example, in 1903, Martin W. Barr, President of the American Association of Medical Officers for Institutions for Idiotic and Feeble-Minded Persons, addressed the virtues of "life-long custodial service" in retardation institutions in these terms:

> "[T]hey partake of the industrial and manual training given in the antebellum days on the plantation, which were in fact — as the world is fast acknowledging — training schools for a backward race, many of whom were feeble-minded."[81]

The recitations of the arguments supporting life-long institutional segregation of retarded people matched the recitations on behalf of Jim Crow: "the shibboleths of . . . the Negro's innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man's civilization"; invocation of "the su-

---

80. C. V. WOODWARD, THE STRANGE CAREER OF JIM CROW 94 (3d rev. ed. 1974). Other standard historical works on Jim Crow include J. H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (5th ed. 1980); R. KLUGER, SIMPLE JUSTICE (1975); I. A. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA 1900-1930(1965); G. M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971).

81. Barr, *State Care of the Feebleminded*, 76 N.Y. MED. J. 1159 (1903). *Compare* the 1900 address of the President of the Southern Education Association on behalf of Jim Crow, *quoted in* C. V. WOODWARD, *supra* note 80, at 95.

Champions of Jim Crow invoked the sterotypes of feeblemindedness against black people. For example, Henry Fairfield Osborn, leading paleontologist and President of the American Museum of Natural History from 1908 to 1933, wrote that the intelligence of "the Negro" rarely exceeded "that of the eleven-year-old youth of the species Homo sapiens"; A. B. Hart wrote, "the Negro mind ceases to develop after adolescence." Osborn, *The Evolution of Human Races*, 26 NAT. HIST. 5 (1926); A. B. HART, THE SOUTHERN SOUTH 104 (1910).

preme law of self preservation"; and the necessity of "the stronger and cleverer race, free to impose its will upon new caught, sullen peoples."[82] William Graham Sumners' 1907 *Folkways* was seized upon to establish "the irremedial backwardness of the negro and the futility of efforts to improve him."[83]

Asserted dangerousness was crucial to the arguments for permanent segregation. For Jim Crow, "a sensational press played up and headlined current stories of Negro crime . . ., a daily barrage of Negro atrocity stories."[84] For life-long segregation of retarded people, the fiction of their dangerousness was also systematically invented and perpetuated. In Texas, for example, in 1914, the State Conference on Charities and Corrections was told by one of its leaders:

> "The refusal of Texas to make provision for its feeble-minded for the simple reason that from them they fear no personal bodily violence is an increasing menace to the mental and spiritual life of our State, in contrast to which the fancied physical safety is negligible. I have used the phrase fancied physical safety, advisedly, for security from bodily ills is not gained through segregation of the insane and promiscuous freedom of the feeble-minded. . . . Not only are the feeble-minded a menace as regards actual criminal proclivities but they are equally a menace as regards public health. [85]

The Jim Crow movement proceeded in "mounting stages of aggression" until, by 1911 " '[i]ts spirit is that of an all-absorbing autocracy of race, an animus of aggrandizement which makes, in the imagination of the white man, an absolute identification of

82. C. V. WOODWARD, *supra* note 80, at 70, 72-73.

83. R. KLUGER, *supra* note 80, at 86.

84. C. V. WOODWARD, *supra* note 80, at 86.

85. PROCEEDINGS (1914), *supra* note 10, at 63. The General Secretary of the National Conference on Charities and Corrections had in 1899 set the National Conference on a campaign to persuade the public that "the feeble-minded" were dangerous. Johnson, *Report of the Committee on Colonies for Segregation of Defectives*, 30 PROC. NAT'L CONF. CHARITIES & CORRECTIONS 248-49 (1903), *quoted in* P. TYOR, *supra* note 76, at 184; *see also* Barr, *The Imbecile and Epileptic Versus the Taxpayer and the Community*, 29 PROC. NAT'L CONF. CHARITIES & CORRECTIONS 163 (1902).

the stronger race with the very being of the state.' "[86] As Richard Kluger has written:

> "Keeping blacks separate, everyone understood, would prevent contamination of white blood by the defective genes of colored people, whose unfortunate traits stemmed from their tribal origins in densest Africa and were incurably fixed upon the face from generation to generation. . . . [T]heir very blackness bespoke their low and brutish nature. All literature, folklore, and custom of the English-speaking peoples reinforced the notion that the African's tawny hide was a primal stain."[87]

The apotheosis of the demands of racial purity was, as the State of Kentucky represented to this Court in its brief in *Berea College v. Kentucky*, 211 U.S. 45 (1908):

> "If the progress, advancement and civilization of the twentieth century is to go forward, then it must be left not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the highest types and geniuses of that race. . . ."[88]

The demands of "racial betterment" required the very most severe measures within their grasp. Solutions beyond segregation were examined but had to be discarded. The Texas pamphlet was illustrative: ". . . euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present day ideas of religion and humanity." *Segregation* "has appealed to society's feelings of humanity and fair play with greatest force." *Segregation* is "the most feasible, most easily put into force, and *least subversive of constitutional prerogative*"[89] — a plain statement of the impact on the Era of *Plessy v. Ferguson*, 163 U.S. 537, 544-52 (1896). Without *Plessy's* permission, no state in contemplation of the Fourteenth Amendment could have dared to impose life-long segregation upon any citizen.

---

86. C. V. WOODWARD, *supra* note 80, at 108.
87. R. KLUGER, *supra* note 80, at 305.
88. *Id.* at 87.
89. C. S. YOAKUM, *supra* note 10, at 82 (emphasis supplied).

State-imposed segregation was justified as benign and even beneficial to its victims according to the near constant professions of those who established it. Segregation of "the feebleminded," the Texas rationale went, consistent with a "deep and abiding charity," "permits all to live under those circumstances best suited to make each useful and happy."[90] As to segregation by race, a Texan wrote, "both races believe that a separate social life is most desirable and most practical."[91] Jim Crow in Texas was not "petty persecution of the Negro, attributed to a desire to humiliate, stigmatise, and degrade him, [it is] the embodiment of enlightened public policy, and is the surest guarantee of a minimum of friction between the races."[92] Separation, President Woodrow Wilson said, was "not humiliating, but a benefit . . . 'rendering them more safe in their possession of office and less likely to be discriminated against.' "[93]

The Cleburne ordinance excluding "homes for the . . . feebleminded" is thus not an isolated enactment but the perpetuation of a pattern of invidious inflictions.[94] Indeed, the legislation from which Cleburne's exclusionary provision is copied — Dallas' ordinance of 1929[95] — was formulated in the era that established the state regime for the life-long segregation of retarded people.

This case will determine whether that regime of segregation will be disestablished and whether a decent respect will be ex-

---

90. *Id*. at 83.

91. R. E. SMITH, CHRISTIANITY AND THE RACE PROBLEM 10 (1922).

92. A. H. STONE, STUDIES IN THE AMERICAN RACE PROBLEM 64 (1908).

93. R. KLUGER, *supra* note 80, at 91.

94. Amici had available to them, in the library of the University of Texas at Austin, current zoning ordinances of sixty Texas cities. Of these, the codes of twelve cities explicitly exclude homes for persons with retardation from neighborhoods where comparable dwellings for non-retarded persons are permitted. They are AMARILLO CODE, chs. 26-8, 26-11(43a); BEAUMONT CODE, §42-15(A)(1); CAROLLTON CODE, art. XV(14); COPPERAS COVE CODE, §5(4)(m); DUNCANVILLE CODE, art. III(14); EDINBURG CODE, art. IV, §4-2(3); KILLEEN CODE, ch. 9, art. 2, §8-1(f); MIDLAND CODE, §11-1-10(A); NEW BRAUNFELS CODE, §6C.1-6; PORT NECHES CODE, §24-6; SAN ANGELO CODE, §33-2-14(6); SULPHUR SPRINGS CODE, art.6(a).

95. The ordinances are set out in App. B.

tended to retarded people. Disestablishing that regime requires the full measure of equal protection lest retarded people be again treated as "unfit for citizenship."[96]

II. CLASSIFICATIONS BASED UPON RETARDATION THAT EXCLUDE AND SEGREGATE RETARDED PERSONS ARE SUSPECT AND SHOULD BE GIVEN STRICT AND SEARCHING SCRUTINY.

A. A History of Purposeful Unequal Treatment Imposed By the State Triggers the Standard for Strict Scrutiny of Legislative Classifications.

This terrible, purposeful life-long segregation of retarded people undertaken by the states to separate "them" out entirely from the rest of "us" constitutes the extraordinary "history of purposeful unequal treatment" that is the predicate of strict and searching scrutiny of legislative classifications. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

Retarded people *as such*[97] "have . . . experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement*

---

96. 1920 Miss. Laws 288, set out at p. A-47.

97. The basis of classification that amici urge be held suspect is not the use of "intelligence" across the spectrum of capabilities, but rather the specific targeting of the lowest end of the spectrum, *as such*. The suspect criterion is not intelligence but the status of "being retarded." Thus fine points of state college admissions requirements or civil service examinations, for example, may rest upon rational bases. No people in this country ever have been forcibly sterilized or chained to the walls of an institutional back ward because they failed to gain admission to Harvard. The evil here is the targeting of retarded people as such. To be sure, college admissions based on SAT scores do discriminate against retarded people, and retarded people (among others of us) are barred from Harvard (or Berkeley, if state action is wanted). But such discrimination based upon intelligence under the Equal Protection Clause should be viewed as "indirect deprivation" as in *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981) or as "unintentional" or "incidental" as in *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

v. Murgia, 427 U.S. 307, 313 (1976).[98] The disqualifications imposed by the regime of segregation are the most severe imaginable among citizens: retarded people as such are "not only deprived of their physical liberty, [but] also deprived of friends, family and community." *Parham v. J.R.*, 442 U.S. 584, 626 (1979) (concurring & dissenting opinion).

Legislative classifications that segregate, exclude or isolate retarded people, precisely because they are based in this history of purposeful unequal treatment are thus "more likely than others to reflect deepseated prejudice," *Palmore v. Sidoti*, 104 S. Ct. 1879, 1882 (1984); *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), and to embody — as the ordinance here plainly does — exactly the kind of "class or caste" treatment that the Equal Protection Clause was designed to abolish. Such legislative classifications should, therefore, be treated as presumptively invidious.

B. Retardation Is an Immutable Characteristic That Has Been Subject to Invidious Classification.

The characteristics of racial status that betoken a special vulnerability to historically provoked invidious classification, and that have thus caused the Court to apply a constant, searching scrutiny to disadvantaging racial classifications, are present also in the status of being retarded. That status is observable and immutable; retardation is present from birth or early thereafter through all of life, and is present through no fault of the retarded person, nor any reason within the person's control.

In these characteristics, the status of being retarded is more like racial status than is illegitimacy, alienage or national origin, each of which the Court has variously said are suspect bases for classification.

---

98. Neither the aged, the mentally ill, alcoholics, drug addicts nor "victims of cancer . . . , the unemployed, or bankrupts," Brief for the United States as Amicus Curiae at 9, has ever been subjected to such a regime of state-imposed, life-long segregation.

The Court has regarded illegitimacy in many respects as analogous to the characteristics of a racial classification.[99] *Trimble v. Gordon*, 430 U.S. 762, 767 (1977). Because of the mutability of illegitimacy and its essential social invisibility, even apart from the limited disqualification that status has historically imposed, the Court has declined to apply "strictest scrutiny" to illegitimacy. *Id.* In terms of suspect characteristics, illegitimacy resembles a racial status less than does the status of being retarded. Retardation or skin color, unlike illegitimacy, cannot be eliminated by the child's parents subsequently marrying or filing a court paper acknowledging their responsibility for their child.

Although classifications based on alienage have been held to be "inherently suspect,"[100] the Court has been willing to approve discrimination involving alienage on occasion because of the relative mutability of the status, its relative invisibility, and the absence of gross and pervasive hardships imposed on aliens *as such*.[101] The classifications held offensive,the Court emphasized in *Foley v. Connelie*, 435 U.S. 291, 295 (1978), were "exclusions" that "struck at the non-citizens' ability to exist in the community." On those occasions that it has permitted alienage classifications, the Court has noted that alien status is alterable by the individual persons who "in effect [choose] to classify themselves." *Ambach v. Norwick*, 441 U.S. 68, 80 (1979); *see Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Moreover, in *Plyler v. Doe*, 457 U.S. at 220, the school exclusion imposed on alien children was overturned precisely because the children were helpless in changing their alien status (this would depend upon their parents) and because of the pervasive hardship worked on the children by their exclusion from education.

---

99. " 'Visiting this condemnation on the head of an infant is illogical and unjust.' . . . [I]llegitimate children can affect neither their parents' conduct nor their own status." *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977).

100. *Graham v. Richardson*, 403 U.S. 365, 372 (1970); *Examining Board v. Flores de Otero*, 426 U.S. 572, 602 (1976).

101. *E.g., Matthews v.Diaz*, 426 U.S. 67 (1976).

C. Utilization of a Suspect Standard for Disadvantaging Classifications Will Not Be Fatal to Classifications That Benefit Retarded People.

Suspect class status does not mean that the classification can never be used for any purpose. Scrutiny of a classification based upon race must be "strict" and "searching" but it is *not* automatically "fatal in fact." G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 752 (1980). As to race itself, the Court has ordinarily applied strict scrutiny only to "disadvantaging racial classifications," *id*. at 745-52, in particular to classifications that exclude or segregate (or are a part of the exclusionary regime), *e.g.*, *Loving v. Virginia*, 388 U.S. 1, 9-12 (1967). Furthermore, this Court has upheld racial classifications under strict scrutiny so long as there is a sufficient showing that the classification in fact benefits the suspect class, overcoming past discrimination or its virulent effects. *Bakke*, 438 U.S. at 355-62 (Brennan, White, Marshall, Blackmun, JJ.); *Fullilove v. Klutznick*, 448 U.S. 448, 472 (Burger,C.J., White, Powell, JJ.); *id*. at 495, 496 & n. 1. (Powell, J.); *id*. at 517-19 (Marshall, Brennan, Blackmun, JJ.); *id*. at 532, 548 (Stevens, J.) (1980).

Accordingly, special education programs for retarded children would not fall. Thus, applying the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401, the Court has held that the standard for "appropriate" educational programs provided for under the Act is that they be "reasonably calculated to yield educational benefit," akin to a minimum rationality standard. *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. at 203, 207 nn. 25, 28. But, under that Act, any exclusionary or isolating form of special education is justified only if a segregated program in fact benefits the child and its segregation is demonstratedly necessary to that benefit, akin to a strict and searching standard. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 196 (1984).[102]

---

102. The *Roncker* court correctly articulated the statutory test as "whether the services which make [the segregated] placement superior could feasibly be provided in a non-segregated setting. If they could, the placement in the segregated school would be inappropriate under the Act." This standard would

Thus, familiar classifications *including* retarded people in governmental assistance programs and in programs for special assistance (which the United States unaccountably raises as troublesome[103]) are, like other welfare classifications, subject only to minimum scrutiny. Any classification in such a program, however, that segregates or excludes retarded people would trigger searching scrutiny and would be sustained only if the segregation in fact benefits retarded people and is necessary to secure that benefit.

D. Cleburne's Exclusion of Retarded People from the Community Is Perverse: It Cannot be Justified on the Basis of Any Characteristic or Need of Retarded People.

The excluding legislative classification at issue here subjects retarded people "to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313. Indeed, "to the extent it reflects any [real] difference between [retarded people and non-retarded], it is actually perverse." *Craig v. Boren*, 429 U.S. 190, 212-13 (1976) (Stevens, J., concurring).

Separating retarded people is perverse. Plainly so when measured against any profession of benign purpose as to retarded people; less evidently, perhaps, because of the stereotype, but no less plainly when measured against any legitimate[104] purpose

govern the continued provision of programs for retarded persons in institutional settings, allowing those that demonstratedly benefit retarded persons and that could not be provided elsewhere in a non-segregated setting.

103. If the problem is thought to be that special programs for retarded people exclude non-retarded people, the answer is that non-retardation can in no way be thought to be a basis for suspectness. If the problem is that special programs isolate retarded people, and hence trigger searching scrutiny, the practical answer is that special programs for retarded people need not isolate them, but that if they do truly isolate retarded people then, because of the risk that deep-seated prejudice and *not* any real benefit has prompted the isolation, the necessity of such isolation to benefit *should* be searchingly scrutinized.

104. The Court has rejected summarily argument that "discrimination may be justified by a desire to discriminate" as "unpersuasive on its face." *E.g., Examining Board v. Flores de Otero*, 426 U.S. at 605; *Buchannan v. Worley*, 214 U.S. 60 (1916).

"The Constitution cannot control such prejudices but neither can it tol-

concerning the quality of life and community for the rest of "us."

Learning (and much else) by retarded people requires the example of other non-retarded people and in real-world environments where what is learned is done.[105] As for all people, but relatively more so for retarded people (it is one of their "differences"), learning by retarded people during all of life proceeds in significant part by imitation and example and in the concrete, rather than by generalization from one context into another. Learning by retarded people flourishes in properly structured and integrated environments; in isolation it is destroyed.[106]

As members of the community, retarded people of *all* ranges of ability can and do maintain not only steady but productive jobs.[107] Retarded people can and do significantly care for themselves, keep clean and even pleasing rooms, and respect the rights of others, for in the community you never know when a friend whose respect you wish to keep may drop in.[108] Retarded people do make good neighbors, to their own benefit and their neigh-

---

erate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Palmore v. Sidoti, 104 S.Ct. at 1882.

105. *See, e.g.*, Brown, *et al.*, *Toward the Realization of Integrated Educational Environments for Severely Handicapped Students*, 2 REV.AM.ASSN. EDUC. SEVERELY & PROFOUNDLY HANDICAPPED 195 (1977); R. HORNER & G. BELLAMY, *Structured Employment: Productivity and Productive Capacity*, in VOCATIONAL HABILITATION FOR SEVERELY HANDICAPPED PERSONS (G. Bellamy, *et al.*, eds. 1979).

106. Thus, the loss in institutions of skills achieved by retarded people *before* institutionalization, and the terrible explosion of aberrant behavior and injury in institutions, arise because the segregated retarded people have only their custodians and themselves to imitate. *Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (concurring opinion); *Pennhurst State School & Hospital v. Halderman*, 104 S.Ct. 900, 904 (1984).

107. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED WORKER. AN ECONOMIC DISCOVERY: REPORT TO THE PRESIDENT (1983); Bellamy, *et al.*, *Habilitation of Severely and Profoundly Retarded: Illustrations of Competence*, 10 ED. & TRNG. MENT. RETARDED 174 (1975).

108. *E.g.*, PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE LEADING EDGE, SERVICE PROGRAMS THAT WORK: REPORT TO THE PRESIDENT (1978).

bors'.[109] The abysmally ignorant stereotypes to the contrary do not withstand the facts or a correct understanding of what difference being retarded makes. Retarded people need assistance, as do all persons, often relatively more, but that means not exclusion from the community but participation in it.[110]

The City of Cleburne's excluding ordinance and the regime of segregation of which it is a part would create an "underclass of . . . citizens," a permanent caste, perverse from the standpoint of any state purpose legitimate under the Equal Protection Clause. *Plyler*, 457 U.S. at 239 (concurring opinion). "We can't ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler*, 457 U.S. at 221.

III. THE CONTINUED VIRULENCE OF CLASSIFICATIONS EXCLUDING AND SEGREGATING ON THE BASIS OF RETARDATION REQUIRES THEY BE GIVEN STRICT AND SEARCHING SCRUTINY.

Observing the destructiveness of life-long segregation upon retarded people, Fernald and others later changed their minds and withdrew from their positions. But the power of the state had already been engaged and no personal apology could have dissolved its terrible force, nor did it. Once established the purposeful regime of segregation and the deep-seated prejudices it legitimated are not so easily disestablished.

The extraordinary undertakings of the states, all of them, in that segregating Era "put the weight of government behind . . .

109. *E.g.*, R. PERSKE, NEW LIFE IN THE NEIGHBORHOOD (1980); *cf. Columbus Board of Educ. v. Penich*, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting) ("integration" furthers the "essential" end that "diverse peoples of our country learn to live in harmony and mutual respect").

110. The power of the stereotype is sometimes irresistible even by the most caring persons. In *Romeo*, for example, the Court observed that "[r]espondent, in light of the severe character of his retardation, concedes that no amount of training will make possible his release." 457 U.S. at 317. Yet ten months after the Court's decision, Nicholas Romeo moved to a group home in Philadelphia and since April, 1983, has successfully lived in the community, working in a community workshop. Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Phila. Inquirer Mag., May 27, 1984, at 18.

hatred and separatism" as virulent as racial hatred and separatism. *Bakke*, 438 U.S. at 357-58 (Brennan, White, Marshall, Blackman, JJ.). "It would ignore reality to suggest that prejudices" so like "racial and ethnic prejudices do not exist or that all manifestations of these prejudices have been eliminated." *Palmore v. Sidoti*, 104 S.Ct. at 1882.

Substantial political victories in such enactments as the federal Education for All Handicapped Children Act, and the visible organization of the Associations for Retarded Citizens, National Down Syndrome Congress and People First organizations themselves do not differentiate retarded from black people; they show yet another direct parallel. The federal Education for All Handicapped Children Act was as much a response to initial judicial "discovery" (and invalidation) of the gross discrimination by the States against retarded people[111] as were the Civil Rights Acts of 1964, 1965 and 1968 a response to *Brown*. In both instances, moreover, the legislation was belated recognition of past abuse and an expression of resolve to remedy this abuse. The Court has not read this belated political "success" of blacks to mean that racial classifications by states are no longer suspect. *Palmore v. Sidoti*, 104 S.Ct. at 1882.[112]

Retarded people continue to be under the pains of the regime of purposeful discrimination. Invidious statutes and ordinances — like the Cleburne ordinance — are still on the books and routinely applied to disadvantage retarded people.[113] The continued virulence of classifications excluding people with re-

---

111. In its opinion in *Rowley*, 458 U.S. at 192-93, the Court recognized the origin of the Education Act in the judicial decision in *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F.Supp. 245(E.D. Pa. 1972).

112. The enforceability against states of the congressional enactments, and even whether they have any meaning or not, may depend upon whether a Fourteenth Amendment right underlies them. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16-18 (1981).

113. *See, e.g.*, zoning ordinances cited *supra* note 94; for state laws prohibiting retarded persons from marrying, see Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons*, 13 GONZAGA L. REV. 625, 677-689 (1978).

tardation is plainly evident and is painfully experienced by retarded people and their families. The practice of denying corrective surgery to retarded children is longstanding.[114]

Notwithstanding the congressional realization that "the vast majority"[115] of retarded persons institutionalized should not be in those institutions, and the continuing congressional concern and attention to the unending reports of abuse, neglect and deterioration of retarded persons in those institutions, thousands of retarded persons remain in segregated institutions subject to their acknowledged, decried, but ultimately condoned brutality.[116] Retarded people seeking to reenter the society from which they have been excluded face rejection, antipathy and hostility from organized society.[117]

Daily, the amici organizations have cause to try to assert against continuing prejudice and invidious official action the claims of retarded people to a decent respect. As the President's Committee on Mental Retardation has reported:

> "So much has happened in the past 25 years to reverse social policies, to change public attitudes, to open the way to reducing the occurrence of mental retardation and to improve the quality of life for mentally retarded persons that we are

---

114. For evidence of the social acceptability of withholding treatment from retarded infants, see Hentoff, *The Awful Privacy of Baby Doe*, ATLANTIC, Jan., 1985, at 54. For the persistence of the practice see note 74 *supra*.

115. S. REP. NO. 94-160, 94th Cong., 1st sess. 32 (1975).

116. *Compare Institutional Care and Services for Retarded Citizens: Hearing Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Resources*, 98th Cong., 1st sess. 63-104, 224-30 (1983); *with* B. BLATT & F. KAPLAN, CHRISTMAS IN PURGATORY: A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION (1974); *see Youngberg v. Romeo*, 457 U.S. at 310; *Pennhurst State School & Hospital v. Halderman*, 451 U.S. at 7.

117. *See, e.g.*, Keating, *The War Against the Mentally Retarded*, N.Y. MAG., Sept. 17, 1979, at 87; Finley, *Arson Hits House Planned for Retarded*, Detroit News, Apr. 30, 1982; Ford, *2d Home for Retarded Is Set Ablaze*, Detroit Free Press, Dec. 5, 1980; Christensen, *"Not My Block" Reactions Greet Group Homes*, Dayton Daily News, Mar. 18, 1984; *see also* D. & S. ROTHMAN, THE WILLOWBROOK WARS 180-99 (1984).

tempted to think the problem is essentially solved, that we can coast in on the momentum of these achievements. *Nothing could be further from the truth*.[118]

By invoking the full measure of respect that the Equal Protection Clause requires be extended, this Court can assure that retarded people are not further treated as "unfit for citizenship" and disestablish the invidious regime. The country is beginning to recognize past error; states are beginning to return retarded citizens to their communities. The Court must not allow the Cleburne ordinance enacting the spirit of the segregating past to be utilized now to reverse a new beginning. To do so would be to officially sanction the regime of segregation again.

CONCLUSION

For the foregoing reasons, the Court should hold that retarded people are a suspect class. On that basis, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Thomas K. Gilhool*
Frank J. Laski
Michael Churchill
Judith A. Gran
Timothy M. Cook

Public Interest Law Center
of Philadelphia
1315 Walnut St., Suite 1632
Philadelphia, PA 19107
(215) 735-7200
Counsel for amici curiae

Date: February 2, 1985

**Counsel of record.*

---

118. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, MENTAL RETARDATION, PAST AND PRESENT 259 (1977)(emphasis provided). In its report to the President the Committee went on to warn:

> "In truth we have only a beginning. Social policies have been only partially turned around, and could swing back again to repressive, restrictive, dehumanizing methods of control." *Id*.

APPENDICES

APPENDIX A

COMPENDIUM OF PURPOSEFUL STATE ACTION FOR THE SEGREGATION AND EXCLUSION OF RETARDED PERSONS IN THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

This Appendix presents the official actions of the states promoting and requiring by statute the segregation of retarded people.* Amici have included a sampling of state reports of agencies, officials, committees and boards that constitute the legislative history and the post-enactment history of the laws that were adopted.** All italics have been added by amici.

CONTENTS

	Page
Northeastern States	A-1
Connecticut	A-1
Delaware	A-4
Maine	A-5
Maryland	A-5
Massachusetts	A-6
New Hampshire	A-9
New Jersey	A-10
New York	A-12
Pennsylvania	A-18

*In addition to the 50 states, the federal law enacted by the United States Congress to segregate retarded people found in the District of Columbia is set out at A-76-81.

**For a sampling of state actions affecting retarded people in other areas, *e.g.*, restrictions on marriage, voting, and education, see Appendix B to the Amici Brief of the American Association of Mental Deficiency, *et al.*

CONTENTS—*(Continued)*

	Page
Rhode Island	A-20
Vermont	A-21
Midwestern States	A-22
Illinois	A-22
Indiana	A-22
Iowa	A-25
Kansas	A-26
Kentucky	A-29
Michigan	A-29
Minnesota	A-32
Missouri	A-32
Nebraska	A-33
North Dakota	A-35
Ohio	A-36
South Dakota	A-37
Wisconsin	A-42
Southern States	A-44
Alabama	A-44
Arkansas	A-45
Florida	A-45
Georgia	A-45
Louisiana	A-46
Mississippi	A-47
North Carolina	A-48

CONTENTS—*(Continued)*

Page

Oklahoma A-49
South Carolina A-50
Tennessee A-51
Texas A-52
Virginia A-57
West Virginia A-60
Western States A-61
Alaska A-61
Arizona A-61
California A-62
Colorado A-67
Hawaii A-68
Idaho A-68
Montana A-69
Nevada A-70
New Mexico A-70
Oregon A-70
Utah A-72
Washington A-73
Wyoming A-75
District of Columbia A-76

Northeastern States

Connecticut. The first recorded provision of a specialized facility for retarded people in this country occurred in Connecticut when the American Asylum for the Deaf and Dumb, located in Hartford, in 1818 counted among its students a few "idiot children." REPORT OF THE COMMISSIONERS ON IDIOCY TO THE GENERAL ASSEMBLY OF CONNECTICUT 62 (1856). Later, the Connecticut legislature provided some funding for a private school in Lakeville. After the turn of the century, though, that facility began receiving a sharply increased number of residents, and it soon became a custodial institution. In 1906 the Director was already reporting that "removals are almost unknown." REPORT OF THE DIRECTORS AND SUPERINTENDENT OF THE CONNECTICUT SCHOOL FOR IMBECILES 6 (1906).

By 1908 the operators of the facility claimed they had "a wide knowledge of the imperative need of providing *permanent* custodial care for the safeguarding of girls and women of feeble mind, and a growing appreciation of the preventive value of equal custodial care for the male of evil tendencies. Backed by effective legislation the care of the defective has resolved itself into a comparatively simply matter. . . ." REPORT OF THE DIRECTORS AND SUPERINTENDENT OF THE CONNECTICUT SCHOOL FOR IMBECILES 12 (1908). "[T]he surest, most humane and most economical solution of the problem of prevention lies in providing custodial care for the feeble minded of every condition and *for a lifetime.*" *Id.* at 13.

In 1911, the General Assembly enacted a statute providing that "imbecile[s]" could be admitted to the Lakeville facility by application of the "selectmen" of any town. 1911 Conn. Pub. Acts 1493, ch. 211. In 1913 the state formally took control of the institution by enactment of a statute specifying that its "object" would henceforth be the "custody" of any "imbeciles resident of this state." 1913 Conn. Pub. Acts 1765, ch. 160, §1.

The following year, state officials reported that they were "of the opinion that the problem of the feeble-minded in the State of Connecticut urgently demands a much more adequate provision for these unfortunate individuals than is now supplied. It has been estimated that *there must be at least three thousand feeble-minded in the State, and at the present time, provision is made for only three hundred.* It is a now recognized fact that feeble-mindedness is to a much greater extent than insanity an inheritable condition and it is known that this class is particularly prolific. The criminal, the alcoholic, and the prostitute are all recruited from the ranks of the feeble-minded. The only practicable way to restrict the growth of the feeble-mindedness in the state is to *segregate* the feeble minded and particularly feeble-minded women during the child bearing-period. The question to be decided is really this: Shall we of this generation accept the burden of this care, or shall we hand on to the next generation a much larger share? Undoubtedly failure to *now segregate* the feeble-minded will result in an increasing prevalence of the condition as time goes on." STATE OF CONNECTICUT, BIENNIAL REPORT OF CONNECTICUT SCHOOL FOR IMBECILES, LAKEVILLE, CONN., FOR TWO YEARS ENDED SEPTEMBER 30, 1913-14, at 8 (Pub. Doc. No. 15, 1915). The report also recommended that the "institution should not be situated in the midst of a populous village. While it should be convenient to railroad communication, it should be somewhat *remote from the centers of population for reasons that are obvious.*" *Id.* at 7.

In order to gain public support for the new facility, Superintendent Charles T. LaMoure and the Board of Trustees of the School for Imbeciles published and distributed widely a pamphlet in which they claimed an urgent need to "[s]top the supply of the vicious, the weak, the no-willed people who cannot support themselves in the community — of the criminals and prostitutes and paupers, by cutting off the supply at its source, namely

— by providing adequate *custodial care for the feeble-minded of the State.*" THE CONN. SCHOOL FOR IMBECILES, THE MENACE OF THE FEEBLE-MINDED IN CONNECTICUT 9 (1915). These "feeble-minded" people, "though really children, are *allowed to go about through the community as though they were adults*. They have an impaired sense of right and wrong, weak will power and no power of realizing the future. . . .

"Moreover, the feeble-minded are unusually prolific. Therefore the longer the State of Connecticut delays in making adequate provision for the feeble-minded, the greater the burden of feeble-mindedness she will have to bear in future *[sic].*" *Id.* at 3. But they proposed a solution: "The State has the opportunity of buying for this institution a large tract of forest and arable land — between six and seven hundred acres. . . . This property is in the central part of the State, *remote from centres of population* . . . and there is room for the institution to grow indefinitely." *Id.* at 13. For this purpose, "[t]he trustees of the Connecticut School for Imbeciles are asking the General Assembly for authority to sell the present plant, and to use the proceeds and $200,000 to be appropriated by the State in the purchase of this property, and in equipping it for the needs of the institution. This would provide, aside from the necessary alterations to buildings, etc., sufficient cattle and farming implements, so that the institution could produce its own milk and vegetables, *using for the most part the labor of its high grade patients.*" *Id.* at 14.

On February 25, 1915, a hearing was held before the state legislature's Committee on Humane Institutions. One witness testified that "hardly a week goes by but what we have a case of a feeble-minded girl or boy called to our attention. We have no way of *getting rid of* these kinds of cases." *Connecticut School for Imbeciles: Hearings on H. B. No. 644 Before the Joint Standing Committee on Humane Institutions* 20 (typed transcript, Feb. 25, 1915) (statement of Mr. Kerner of Waterbury). An-

other thought it necessary for "every feeble-minded child in the school [to be] eliminated or placed in a special class." *Id.* (statement of Miss Wright of Stanford). Superintendent Alexander Johnson of New Jersey's institution at Vineland brought to the Committee's attention "this book called, 'The Menace of the Feeble-Minded in Connecticut,' which was gotten up by the Board of Trustees for the School of Imbeciles, and I would recommend anyone who has any doubt as to the proper care of that class to read this book very carefully." *Id.* at 2 (statement of Dr. Johnson).

On May 20, 1915, the Connecticut legislature followed the recommendations of the state officials and the witnesses at the hearing and appropriated the $200,000 requested for an ambitious construction project on state-owned land at Mansfield Depot, an isolated railway stop sixty miles northeast of Hartford.

By the time he wrote his 1916 Biennial Report, Superintendent LaMoure thought that "[t]he dangers associated with allowing *the feeble-minded to remain at large* among the general population have been so frequently discussed that it is not necessary to do more than refer to them." STATE OF CONNECTICUT, BIENNIAL REPORT OF THE CONNECTICUT TRAINING SCHOOL FOR FEEBLE-MINDED, LAKEVILLE, CONN., FOR THE TWO YEARS ENDED SEPTEMBER 30, 1915-16, at 7 (Pub. Doc. No. 15, 1917). He looked forward to the completion of the new institution, where, he noted, "[m]any of the male *inmates* . . . are capable of doing *a considerable amount of satisfactory farm work* under supervision, and, with a proper farm we should be in a position to improve the quality of our food and save the State a considerable amount of money by raising vegetables, producing our own milk and eggs, and using rather than wasting our garbage by the keeping of pigs." *Id.*

Delaware. On March 21, 1917, the Delaware General Assembly established the state's first home for "the feeble-minded." 1917 Del. Laws 597, ch. 172. The in-

stitutionalization of such persons could be sought by "any reputable citizen of the State," which was to be ordered by the county judge "when by reason of such mental condition, *or of existing social conditions*, it would *be detrimental to any community of this State to allow such person to remain at large*." *Id.* §9.

The legislature also adopted "AN ACT to provide for the sterilization of certain mental defectives," 1923 Del. Laws, ch. 62, authorizing the surgery for those at the state home for whom a "physician, alienist and superintendent unanimously determine that procreation *is unadvisable*." *Id.*

Maine. In 1907, the Legislature of Maine established the "Maine School for Feeble Minded." 1907 Me. Acts 42, ch. 44. A special committee chaired by Governor William T. Cobb "[a]fter careful consideration," located the institution "on an area of farmland. . . . The plan called for a large tract of land, which should be removed from any large town. . . ." Hood, *Pineland Observer*, in PINELANDS, 60 YEARS: 1908-1968 (L. Moore, ed. 1968).

In 1921, the lawmakers extended those eligible for commitment to "idiotic and feeble-minded males, between the ages of six years and forty years, and females, between the ages of six years and forty-five years." 1921 Me. Acts 65, ch. 60. Four years later, the legislature authorized sterilization for all those for whom that surgery "may be indicated for the prevention of the reproduction of further feeble-mindedness." 1925 Me. Acts 198, ch. 208.

Maryland. On March 31, 1888, the General Assembly of Maryland passed "AN ACT to establish an asylum and training school for the feeble minded of the State of Maryland." 1888 Md. Laws 268, ch. 183. In 1906, the lawmakers mandated that the institution "receive, care for and educate, free of charge, all idiotic, imbecile and feeble-minded persons in this state" approved by the board of visitors of the facility. 1906 Md. Laws 653, ch. 362. The law required that "all such persons shall re-

main in the care, *custody and control* of the visitors of said institution, and the visitors of said institution are hereby authorized to *retain all such persons* in their care, *custody and control* at said institution, until such time as in the judgment of said visitors, or a majority of them, the welfare of such persons *and the public interest* shall justify or call for their release. . . ." *Id.* at 653-54.

The Board of Visitors campaigned vigorously for increased admissions. These reports revealed the institution's segregating purposes: "One of the sad features which hangs as a black cloud over the work, is the fact that some hundreds of children, many of whom are *a burden to the family and a menace to the community in which they live,* are continuously knocking at our doors for admission, but only a small number of these can be received solely for want of funds to maintain them, though we have empty beds awaiting their reception." TWENTY-FOURTH REPORT OF THE BOARD OF VISITORS OF THE ROSEWOOD STATE TRAINING SCHOOL, OWINGS MILLS, BALTIMORE COUNTY 5 (1936).

Massachusetts. As a result of a legislatively commissioned report authored by Dr. Samuel Gridley Howe of the Harvard Medical School, S. G. HOWE, FIRST COMPLETE REPORT MADE TO THE LEGISLATURE OF MASSACHUSETTS UPON IDIOCY 16, 30-55 (Mass. Sen. Doc. No. 51, 1848), the Massachusetts legislature, on May 8, 1848 appropriated $2,500 for an experimental school for idiotic children to be located in a wing of the Perkins Institute for the Blind in Boston. Howe was named director, and ten indigent "idiots" were selected as pupils. THIRD AND FINAL REPORT ON THE EXPERIMENTAL SCHOOL FOR TEACHING AND TRAINING IDIOTIC CHILDREN 305 (1852).

With perhaps a premonition of the evils that lurked in his creation, Howe stated in his final report: "Now the danger of misdirection in this pious and benevolent work is, that two false principles may be incorporated with the projected institutions which will be as rotten piles in the

foundations and make the future establishments deplorably defective and mischievous. These are, first, close congregation; and, second, the life-long association of a large number of idiots; whereas, the true, sound principles are: separation of idiots from each other; and then diffusion among the normal population. . . . For these and other reasons it is unwise to organize establishments for teaching and training idiotic children, upon such principles as will tend to make them become asylums for life. . . . *Even idiots have rights* which should be carefully considered! At any rate let us try for something which shall not imply segregating the wards in classes, removing them from our sight and knowledge, ridding ourselves of our responsibility as neighbors, and leaving the wards closely packed in establishments where the spirit of pauperism is surely engendered, and the morbid peculiarities of each are intensified by constant and close association of others of his class." S. G. HOWE, REPORT OF THE SUPERINTENDENT TO THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR IDIOTIC CHILDREN (1874).

Howe's advice was forgotten and, by 1886, the Massachusetts legislature had established "a custodial department" for "custody of feeble-minded persons beyond the school age or not capable of being benefited by school instruction." 1886 Mass. Acts & Resolves, ch. 298, §1. After the turn of the century, commitment procedures were modified to permit *any* person, not just relatives, to seek the commitment of "feeble-minded" persons to the institution. *See* 1904 Mass. Acts & Resolves, ch. 459, §5; 1906 Mass. Acts & Resolves, ch. 508, §12.

The superintendent of Massachusetts' institution, Dr. Walter E. Fernald, reported in 1908 that "[t]he existence of this large institution is largely due to the demands of parents, physicians, clergymen, court officers, social workers, and thoughtful people generally, that feeble-minded women should be *permanently removed from the community*. In this State there is an urgent de-

mand for the commitment and *permanent detention* of the higher grade cases of defect, where the social incapacity and the moral weakness are more obvious than the mental backwardness. These cases cannot support themselves, and *are most undesirable and troublesome members of society.*" SIXTY-FIRST ANNUAL REPORT OF THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR THE FEEBLE-MINDED AT WALTHAM, FOR THE YEAR ENDING NOVEMBER 30, 1908, at 22-23 (1909).

On June 12, 1912, Superintendent Fernald delivered an influential speech as the Annual Discourse before the Massachusetts Medical Society, printed and widely distributed in pamphlet form by the Massachusetts Society for Mental Hygiene: "The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness and its influence as a source of wretchedness to the patient himself and to his family, and as a causative factor in the production of crime, prostitution, pauperism, illegitimacy, intemperance and other complex social diseases. . . . The social and economic burdens of uncomplicated feeble-mindedness are only too well known. The feeble-minded are *a parasitic, predatory* class, never capable of self-support or of managing their own affairs. The great majority ultimately become public charges in some form. *They cause unutterable sorrow at home and are a menace and danger to the community.* Feeble-minded women are almost invariably immoral, and if at large usually become carriers of venereal disease or give birth to children who are as defective as themselves. The feeble-minded woman who marries is twice as prolific as the normal woman. . . . *[S]egregation* carried out thoroughly for a generation would largely reduce the amount of feeble-mindedness. The high-grade female imbecile group is the most dangerous class. They are not capable of becoming desirable or safe members of the community. They are never able to support themselves. They are certain to become sexual offenders and

to spread venereal disease or to give birth to degenerate children. Their numerous progeny usually become public charges as diseased or neglected children, imbeciles, epileptics, juvenile delinquents or later on as adult paupers or criminals. The segregation of this class should be rapidly extended until all not adequately guarded at home are placed under strict sexual quarantine. Hundreds of known cases of this sort are now at large because the institutions are overcrowded. Only 2000 feeble-minded persons are now cared for in institutions in this State, and over 1000 applicants are awaiting admission to the institutions. There is an *urgent demand for greatly increased institutional provision* for this class. . . ." W. FERNALD, THE BURDEN OF FEEBLE-MINDEDNESS 3, 7, 10 (1912).

New Hampshire. On March 22, 1901, the New Hampshire General Court enacted legislative to "establish and maintain" the "New Hampshire School for the Feeble-minded Children." 1901 N.H. Laws 597, ch. 102, §1. Although that law limited admissions to "the idiotic and feeble-minded, between three and twenty-one years of age," *id.*, amendments added four years later made provision for others "after they reach the age of twenty-one, if in the judgment of the board of trustees *their segregation seems to be for the best interests of the community*...." 1905 N.H. Laws 413, ch. 23, §1, first for women, *id.*, and later for men as well, 1917 N.H. Laws 645, ch. 141, §1. Later, in 1917, the General Court adopted "AN ACT PERMITTING STERILIZING OPERATIONS" for those for whom that surgery "may be indicated for the prevention of the reproduction of further feeble-mindedness." 1917 N.H. Laws 704, ch. 181, §2. In 1929, the law was extended to permit the superintendent of the institution, if "of opinion that it is for the best interests of the inmate *and of society*" to authorize the surgery without the consent of the "feeble-minded" resident, if after a hearing the governing board of the institution finds that the resident "is the probable potential parent of *socially*

inadequate offspring likewise afflicted." 1929 N.H. Laws 162, 164, ch. 138, §§1, 6.

New Jersey. The New Jersey General Assembly in 1888 established the first New Jersey "home" for the "feeble-minded" at Vineland. 1888 N.J. Laws. 267, ch. 208.

By 1906, state officials were calling for permanent segregation: "It is a fact that the Institutions in New Jersey for the care and training of the feeble-minded do not begin in any way to cover the number of those who should be in the Institutions, and it seems that the Governor, the Legislature and the Commissioner of Charities in their wisdom might hold a conference with the Boards of the Feeble-Minded Institutions, looking towards *the segregation of all the feeble-minded who are now at large*. The feeble-minded belong to that class of defectives of either hereditary degenerates or whose condition is of such a character as should be treated like them, and for whom *the time has come for complete and permanent control.*" ANNUAL REPORT OF THE STATE HOME FOR THE CARE AND TRAINING OF FEEBLE-MINDED WOMEN AT VINELAND, 1906, at 6 (1907). The report indicated that "[t]he most celebrated authorities on the care and segregation of the feeble-minded and other defectives are very much in favor of *the colonization of all defectives* where the development of its members could be properly classified." *Id.* at 7.

The legislature began its response in 1911, by passing "An Act to authorize and provide for the sterilization of feeble-minded (including idiots, imbeciles and morons)." 1911 N.J. Laws 353, ch. 190. That law created a "Board of Examiners of Feeble-minded," which, upon a "find[ing] that procreation is inadvisable and that there is no probability that the condition of such inmate so examined will improve to such an extent as to render procreation by such inmate advisable," was authorized "to

perform such operation for the prevention of procreation as shall be decided by said board of examiners to be most effective. . . ." *Id.* §§ 1, 3.

Two years after its enactment, the New Jersey Supreme Court ruled that New Jersey's law violated the right to equal protection of the laws. *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J.L. 46, 88 A. 963 (1913). The court noted that "the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. . . . Racial differences, for instance, [also] might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue." 88 A. at 965. The court concluded that "it is clear that the order with which we have to deal threatens possibly the life, and certainly the liberty, of the prosecutrix in a manner forbidden by both the state and federal Constitutions, unless such order is a valid exercise of the police power. . . . The general limitation of such power to which the prosecutrix must appeal is that under our system of government the artificial enhancement of the public welfare by the forceable suppression of the constitutional rights of the individual is inadmissible." *Id.* at 965.

In 1915, the legislature provided for more pervasive segregation of retarded people through the admission to Vineland of "mentally defective men, women and children, *of all ages and grades*. . . ." 1915 N.J. Laws 278, ch. 151, § 2. By 1918, the lawmakers had authorized "the location of additional colonies upon forest reserve or other lands owned by the State." 1918 N.J. Laws 410, ch. 147, art. 6 § 636. It was in these institutions that the "inmates" were to be "kept." *Id.* at 409, 410, §§ 631, 635. In 1919, the legislature required relatives "to *waive all right to remove either permanently or for a limited time*" their kin from any institution. 1919 N.J. Laws 508, ch. 217, § 3.

New York. On July 10, 1851, the Legislature of New York adopted "AN ACT to establish an asylum for idiots." 1851 N.Y. Laws 941, ch. 502.

It was not until 1894 that the New York legislature established an institution in Oneida County purely for the "*custody* of unteachable idiots," designated as "the Rome State Custodial Asylum." 1894 N.Y. Laws 806, ch. 382.

The movement to segregate began most earnestly at the same time as the citizenry began to express concern about the "rising tide" of immigration. In 1905, for example, an article in the *New York Times* typical of those appearing during this period discussed the urgent need for "remedying the evils which have too long been tolerated in the 'dumping' of undesirable immigrants into this country." *Undesirable Immigration*, N.Y. Times, Feb. 10, 1905, at 6, col. 3.

In 1911, the first of many studies purporting to link "feeblemindedness" with the new immigration was published under the auspices of the State Charities Aid Association. The survey found that all but 40 of 317 "mentally defective" children selected "at random" from thirty-two ungraded classes in the New York public schools were either foreign-born or the children of foreign parents. A. MOORE, THE FEEBLE-MINDED IN NEW YORK: A REPORT PREPARED FOR THE PUBLIC EDUCATION ASSOCIATION OF NEW YORK, N.Y. (1911).

By 1912, the *New York Times* was reporting a definite link between immigration and "feeble-mindedness." An article appearing on February 18, 1912 quoted "[a]n important report of the special committee appointed by the New York Society for the Prevention of Cruelty to Children to investigate the subject of abnormal and feeble-minded children. . . ." *Feeble-Minded Scholars Make Up 1 Per Cent of the School Population, Investigators Report*, N.Y. Times, Feb. 18, 1912, at 8, col. 4. The report stated that there were in New York City "10,000 mental or moral defectives who now roam at large

in the community without any proper parental supervision or medical care. Recent census statistics show that 80 per cent of the feeble-minded children in the general population of the United States are the progeny of aliens or naturalized citizens. We may safely assume therefore, that at least 8,000 of the 10,000 feeble-minded children in the city today were brought here by or are the offspring of the 9,000,000 aliens who have passed through Ellis Island during the past ten years." *Quoted in id.* at cols. 4-5.

Three weeks later, the *New York Times* featured an article on Henry H. Goddard, who was a state administrator for New Jersey's retardation institution at Vineland. The report began: "From the army of 300,000 feeble-minded persons in the United States come the recruits that swell the ranks of the drunkards, criminals, paupers, and other social outcasts. Twenty-five per cent of the girls and boys in our reformatories are lacking in mental fibre and are unable to discern the difference between right and wrong or are too weak in character to do right whenever there is any inducement to do wrong. Sixty-five per cent of the feeble-minded children have a mother or a father, or both, who are feeble-minded. This country has so far taken no steps to segregate these irresponsible parents, so the number of them is constantly increasing. These facts, and many more equally startling, are set forth in an article written for The Survey by Dr. Henry H. Stoddard, [*sic*] director of the department of research of the training school at Vineland, N.J. 'Our Government spends hundreds of thousands of dollars examining immigrants to see that none who are feeble-minded are admitted,' writes Dr. Stoddard [*sic*]; 'but here is a group already in our country who are breeding a race of feeble-minded people more dangerous than many barred by the Immigration Inspectors.' " *Weak-Minded Fill Ranks of Criminals: Dr. Henry Stoddard [sic] Says Social Problems Can Be Solved By Segregating Them*, N.Y. Times, Mar. 10, 1912, at 6, col. 3. Goddard urged, in language

later quoted in some state statutes, "permanent care where they will be happy and harmless," for all those "unable to compete with their fellows on equal terms. . . . This army furnishes the recruits for the ranks of the criminals, paupers, drunkards, the ne-er-do-wells, and others who are social misfits." *Quoted in id.* "[W]hat then is to be done?" he asked. Dr. Goddard answered his own question by proposing that "[a]fter these cases have been discovered they must be removed from the environment in which it has been proved *they are incapable of living normal lives in accordance with the conventions of society*. They must be colonized in groups where they may be perfectly happy and somewhat useful. Only one limitation needs be placed upon them in these places, and that is they must never become parents." *Quoted in id.* Goddard concluded by emphasizing that "[w]e are discussing a possible State policy . . . many parents are either normal or of such a high grade of defectiveness that they never get into court and yet have feeble-minded children. We cannot touch these adults. We must somehow get hold of their children. . . . We may reasonably hope that a policy of segregation, carefully followed, will in a generation or two largely reduce our feeble-minded population and thereby solve our problems of criminals, disease, drunkenness, and crime." *Quoted in id.* at cols. 3-4.

On April 16, 1912, the legislature created a new state board and empowered it to authorize the sterilization "by such operation for the prevention of procreation as shall be decided by said board to be most effective," "any" institutionalized person who, in the judgment of the board, "would produce children with an inherited *tendency*" to "feeble-mindedness, idiocy or imbecility." 1912 N.Y. Laws 924, 925, ch. 445, §351.

New York's special treatment of its "alien defectives" during this period is evidenced by the response state officials gave to a survey form sent to each state on June 20, 1912 by a Pennsylvania commission gathering information to assist the latter state in expanding its own in-

stitutions. New York's response indicated that the state already had nearly 6,000 citizens segregated, noting specially that it "contributes towards the support of *the alien* poor patients in these institutions." REPORT OF THE COMMISSION ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLE-MINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PENNSYLVANIA 28, 31 (1913). No other group was singled out by New York officials for special support.

It was also about this time that the newly reknowned Henry Goddard was invited by the United States Public Health Service to administer Binet's I.Q. test to the southern and eastern European immigrants arriving in steerage at Ellis Island. "[G]iv[ing] the immigrant the benefit of every doubt," he found that 79% of the Italians, 80% of the Hungarians, 83% of the Jews, and 87% of the Russians he tested were "feeble-minded." Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQUENCY 243, 249, 252 (1917).

The *New York Times* reported in an article entitled *Alien Defectives* appearing on January 13, 1913 that since "three-tenths of feeble-minded children are of alien or naturalized parents, the problem of detecting defective immigrants is very grave." N.Y. Times, Jan. 13, 1913, at 10. The account cited a recommendation by Assistant Surgeon C. P. Knight of the United States Public Health Service at Ellis Island, writing in the January 11 issue of the *American Medical Association Journal*, for "controlling the procreation of the mentally defective by segregating them." *Alien Defectives, supra*. As Dr. Knight had stated, "[t]here is scarcely a ship coming into the Port of New York which does not carry among its passengers a mental defective of some degree." *Id., quoting* Knight, *The Detection of the Mentally Defective Among Immigrants*, 60 A.M.A.J. 106 (1913).

In the *A.M.A. Journal* article, Dr. Knight explained that he had "becom[e] familiar with different races" so he could "tell at a glance the abnormal from the normal."

Id. at 107. "In studying the physical characteristics of mental defectives, the various ethnologic types are easily discerned: the dark skin, the curly hair and thick lips of the Ethiopian, the prominent and high cheekbones and deep orbits of the American Indian and the straight coarse hair and peculiar cast of countenance of the Mongolian." *Id.* Even "more important in the determination of the mental status of the alien," according to Dr. Knight, was "close application to the study of the race." Thus, examiners "should interpret the mental reaction of the alien only after having full knowledge of the different racial characteristics, for that which is a defect in an individual of *a race of high mental attainment* may be a normal condition in the existence of other *people who have not attained the same grade of development*. It is perfectly normal for the southern Italian to show emotion on the slightest provocation but should he show the stolidity and indifference of the Pole or Russian, we would look on him with suspicion and perhaps hold him for a detailed examination." *Id.* By the use of such techniques, Knight hoped to "reduc[e] to a minimum the entrance into this country of the mentally and morally low type of alien. Immigration largely contributes to the high percentage of this class in the United States." *Id.* at 106.

By 1914, the "defectives" were being expelled from the public schools. As the *New York Times* editorialized: "If the policy recommended by the Board of Education's committee on ungraded classes had been sensibly adopted in the beginning a good deal of money might have been saved for teaching sound-minded children that has been wasted on mental defectives who could not be helped. The report says: 'Most imbeciles and all idiots can in no way derive any lasting benefits from attendance at the public schools. Their mental condition cannot be improved either by the course of study or discipline. The only practical and humane solution is institutional care.'" *The Feeble-Minded in Schools*, N.Y. Times, Mar. 13, 1914, at 8, col. 4.

That same year, as a result of the public demand for action, the legislature created a special State Commission to study the problem, as urged by the *New York Times*. 1914 N.Y. Laws 772, ch. 272.

The Commission believed that "we are now in a position where it is both a duty and a privilege to *adopt a complete system of public provision* that will in a very large measure *eliminate the burden of feeble-mindedness from the community*." *Id.* at 18.

Sterilization, according to the Commission, was no panacea, since surgery prevented only parenthood, and did not eliminate the other social menaces stemming from permitting "defectives" to be at large. Moreover, such a law might lead to "withdraw[l] from *the influence of our institutions* large numbers of feeble-minded who otherwise might be amenable to whatever advantages and *whatever custodial provision was made*." *Id.* at 19. STATE OF NEW YORK, REPORT OF THE STATE COMMISSION TO INVESTIGATE PROVISION FOR THE MENTALLY DEFICIENT 19 (1915).

The major problem, according to state officials, was that thousands of "mental defectives are at liberty in the community today . . . without restraint or public control." *Id.* at 34. "To attempt reformation is a gross waste of time and of money. The average cost per inmate in a specially organized institution for defectives is half of the average cost in our reformatory institutions." *Id.* at 35. The solution was to expand the institutions and to bring more of the "defectives" under control.

Accordingly, the legislature enacted on May 14, 1919 "AN ACT in relation to mental defectives. . . ." 1919 N.Y. Laws 1683, ch. 633. The law defined "mental defective" to mean "*any person afflicted with mental defectiveness* from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, who for his own welfare or the welfare of others *or of the community* requires *supervision, control* or care, and who is not insane or of unsound mind." *Id.* at 1684, art. 1, § 2(5).

The legislation established a procedure for certifying that one's mental defect was "of such a nature as to require his *supervision, control* and care for his own welfare and for the welfare of others *or for the welfare of the community.*" *Id.* at 1697, art. 4, § 26. This determination was to be made by "qualified examiners." *Id.* § 25.

As a result of this law, state officials were soon overwhelmed with retarded people to segregate. The State Commission for Mental Defectives indicated in 1926 that although it was "gratifying to report progress during the year in additional housing for mental defectives[, t]he need of more beds is so great that it outweighs other considerations." STATE OF NEW YORK, EIGHTH ANNUAL REPORT OF THE STATE COMMISSION FOR MENTAL DEFECTIVES, JULY 1, 1925 TO JUNE 30, 1926, at 7 (Leg. Doc. No. 92, 1927). The scope of the physical expansion necessitated by the 1919 law was noted in the agency's Annual Report: "Defectives who are detrimental to society cannot *be segregated* until institution bed capacity is increased. Those of too low grade intelligence to be cared for in the public schools are often neglected at home and a source of economic disaster to the family. *The segregation of these in institutions* awaits erection of new buildings." *Id.* Thousands of beds were planned and provided throughout the state. *Id.*

Pennsylvania. In 1893 the Pennsylvania General Assembly authorized the construction of a large institution in western Pennsylvania with a capacity for at least "eight hundred inmates," to include a "custodial or asylum department." 1893 Pa. Laws 289, 290, No. 256, § 7. The facility was to be for the "reception" and "detention" of "idiotic and feeble-minded children," *id.* at 291, § 10, the sole restriction being that they be "under the age of twenty years," *id.* § 11. By 1903, a second institution similarly organized was authorized to be built in the eastern part of the state. 1903 Pa. Laws 446, No. 424.

In 1911, the Pennsylvania Conference of Charities and Corrections argued to the legislature that it had a

large problem on its hands. The legislature decided that a comprehensive study was necessary, and so adopted a joint resolution to establish a special commission, "the duty of which Commission shall be to take into consideration the number and status of feeble-minded and epileptic persons in the Commonwealth and the increase of such persons, and to report to the General Assembly at its next session a plan or plans *for the segregation*, care, and treatment of such defectives. . . ." 1911 Pa. Laws 927, § 1. The resolution was enacted because the legislature felt that "[a] proper regard for the public welfare requires that some action be taken looking to *the segregation* of such feeble-minded and epileptic persons." *Id.* (preamble).

On April 21, 1913, the Commission reported to the legislature that "[w]here the mental disability is of a degree which renders the afflicted individuals *unfit for citizenship*, or a menace to the peace, they are regarded and treated as *anti-social beings, and may be permanently segregated* in institutions especially constructed for their reception and care. The condition of mind in amentia is irremediable[;] *the segregation as the rule should therefore be permanent.*" REPORT OF THE COMMISSION ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLE-MINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PENNSYLVANIA 43 (1913).

The Commission considered retarded people "such an unpleasant burden, that parents usually are more than willing to part with them," *id.* at 38, but "[l]egislation" was "needed to *compel the segregation* of feeble-minded and epileptic persons," *id.* at 40. Who was to be incarcerated? "[A] type of mind must be established as a normal standard for the age, *race* and social status of each individual, and he who falls below this to a recognizable degree is *ipso facto* feeble-minded." *Id.* at 42.

Six weeks later, the legislature enacted comprehensive legislation, creating a new official purpose for the state's institution: "*segregation*" of all "idiotic, imbecile

or feeble-minded persons," 1913 Pa. Laws 494, No. 328, § 1, and the removal of all age restrictions on admissions, *id.* at 496, § 3. The lawmakers also established a new "Village for Feeble-Minded Women" to be "entirely and specially devoted to the reception, segregation [and] detention" of "feeble-minded women of child-bearing age. . . ." 1913 Pa. Laws 1319, No. 817. By 1922, the Superintendent of the Eastern Pennsylvania State Institution for the Feeble-Minded was reporting that "the general public [is] now convinced more than ever that it is a good thing to *segregate the idiot and the imbecile.*" R. SMILOVITZ, A BRIEF HISTORY OF PENNHURST 1908-1926, COMPILED FROM SUPERINTENDENT'S DOCUMENTS (1974).

Rhode Island. The General Assembly of Rhode Island enacted in 1907 "AN ACT FOR THE ESTABLISHMENT, MAINTENANCE, MANAGEMENT, AND CONTROL OF THE RHODE ISLAND SCHOOL FOR THE FEEBLE-MINDED." 1907 R.I. Pub. Laws 89, ch. 1470. Within the institution there was created a special "custodial department for the care and custody of feeble-minded persons beyond school age, or who are not capable of being benefited by school instruction." *Id.* at 90, § 3. Institutionalization could be sought by filing a "complaint in writing" alleging that "any person within the district wherein such court is established is feeble-minded, so as to require restraint for his own welfare *or for the welfare of the public.*" *Id.* at 91, § 6.

The purpose of the institution, according to the first annual report to the legislature, was to "not only protect the [feeble-minded] children themselves, but at the same time *to guard society against the children.*" REPORT OF THE RHODE ISLAND SCHOOL FOR THE FEEBLE-MINDED IN EXETER 20 (1910). State officials strongly encouraged parents to commit their children voluntarily to the facility: "Society is made up of families and when the family suffers society suffers. Talk with any one who has had the opportunity to know intimately the history of families

in which there have been feeble-minded children, and let him tell of the cases of fathers driven to drink, whole families plunged into poverty and pauperism, and of mothers made insane or even done to death *by the presence* of the unfortunate child in the home." *Id.* at 21.

Vermont. In 1913, the General Assembly of Vermont created the "Vermont State School for Feeble-minded Children." 1913 Vt. Acts 96, No. 81, § 1. Proceedings to place a retarded person in the institution could be initiated by, in addition to a parent or guardian, any "selectman of the town . . . in which such child resides." *Id.* at 98, § 13.

In 1916, state officials "report[ed] that the people in Vermont are beginning to take a marked interest in the study of feeble-mindedness, and *its baneful and increasing effects on the population* of the State, and that with a better understanding of the conditions which exist, there will be a tendency to view the handling of the question in a more practical and common sense manner. The burden of feeble-mindedness is felt by the entire public, and every intelligent person who has carefully considered the subject realizes that *this blight on mankind* is increasing at a rapid rate, and that unless radical measures are adopted to curb the influences which tend to promote its growth it will only be a matter of time before the resulting pauperism and criminality will be a burden too heavy for any country or people to bear. *The feeble-minded are a parasitic, predatory class,* never capable of self-support or of managing their own affairs, and the majority of them ultimately become public charges." REPORT OF THE VERMONT STATE SCHOOL FOR THE FEEBLE-MINDED CHILDREN FOR THE PERIOD ENDING SEPTEMBER 30, 1916, at 17-18 (1916).

As a result of the actions of the state, "[t]he public is now fully aware of *the danger the defective is at large* and realizes the importance of instituting means for their control. There is nothing that can be done more effectively toward the prevention of feeble-mindedness, crime and

poverty and *toward the promotion of our best citizenship, than to segregate the feeble-minded* and properly care for them." *Id.* at 18.

Midwestern States

Illinois. On June 24, 1915, the Illinois General Assembly passed a bill establishing a facility as an institution for the "*detention* of feeble-minded persons." 1915 Ill. Laws 245. Such "detention" was mandated not only for the retarded person's "own welfare," but also "for the welfare of others, *or for the welfare of the community,*" so long as the person was "not classifiable as an 'insane person.' " *Id.* at 245-46, §1. "*[A]ny* reputable citizen of the county in which such supposed feeble-minded person resides or is found could seek the institutionalization of such a person by filing a petition stating that it was detrimental "*to the welfare of the community, for him to be at large.*" *Id.* at 246, §3. The "guiding and controlling thought of the court" at these proceedings was to be not only "the welfare of the feeble-minded person" but also "the *welfare of the community.*" *Id.* at 249, § 9.

Indiana. In 1914, Indiana officials reported to the Governor that there were still "at the most conservative estimate that can be made, at least four thousand feeble-minded in Indiana" requiring institutionalization, and that "[these] people are at large, *a nuisance to the community* in which they live; nearly all of them paupers; many of them petty criminals; the women filling the houses of prostitution: all of them poor, improvident, lazy — in short, incompetents. These people are increasing rapidly, and unless cared for will, in the next hundred years, bring an unbearable burden on our grandchildren and great-grandchildren. Shall we leave them such an inheritance, or shall we do something now to stop it? Were we to put all these four thousand defectives now at large into institutional care today, this institution could provide for practically all needing the care of an institu-

tion at the end of the next fifty years. No provision is made for adult male feeble-minded in this State, and these men *should be segregated from the world* in some place where they could be made in a measure self-supporting." THIRTY-SIXTH ANNUAL REPORT OF THE INDIANA SCHOOL FOR FEEBLE-MINDED YOUTH FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1914, at 14 (1914).

In 1915, the Board of State Charities of Indiana adopted a resolution that read: "Whereas, The problem of the mental defective is one of our greatest social as well as financial burdens and is increasing in importance and weight every year, and Whereas, Mental defectiveness is believed to be one of the most important if not the most important cause of pauperism, degeneracy and crime," resolved that a committee be established to make recommendations concerning this problem. Governor Ralston acted favorably on this resolution and appointed a Committee on Mental Defectives.

The work of the Committee and its first report, on November 10, 1916, was used to convince the governor and the legislature that it was "imperative that the State must very soon take cognizance of the large number of dependent defectives at large in the State, a menace to society, increasing at a rapid rate, and take steps *to segregate them from the public*, and thus check their reproduction not alone as a matter of philanthropy, but as an economic measure." THIRTY-EIGHTH ANNUAL REPORT OF THE INDIANA SCHOOL FOR FEEBLE-MINDED YOUTH, FORT WAYNE, INDIANA, FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1916, at 14 (1917). The Indiana officials were also "pleased to note that 'The Committee on Mental Defectives' appointed by you to study the problem of Mental Defectiveness in Indiana, recently urgently recommended the enactment of such a law, and we wish to strongly endorse their recommendation and urge that this remedial legislation be had at the coming session of the Legislature. We have deeply felt the need of this law in several cases in recent years, where we found ourselves

utterly helpless to prevent the withdrawal of girls by parents or relatives while we knew that were *unfit to be out in the world. . . .*" *Id.* at 15. They also recommended "the establishment of a new and separate institution to house them from *the danger of contact with the public.*" *Id.*

The Committee on Mental Defectives was reappointed by newly elected Governor James P. Goodrich. The Committee's second report was published March 6, 1919.

One week later, the General Assembly passed as "emergency" legislation "AN ACT to provide for the establishment and government of an Indiana farm colony for feeble-minded" which incorporated practically all of the recommendations of the Committee on Mental Defectives. 1919 Ind. Acts 480, ch. 94. The lawmakers created a commission and ordered it to "select a suitable site for the farm colony" and to "purchase not less than 1,000 acres of land in a body" for it. *Id.* § 2. The law specified that "the buildings to be constructed for its use shall be plain and inexpensive in character," *id.* at 482, § 6, and required that "the labor in constructing such buildings, improvements and facilities shall be supplied as far as applicable by the persons committed to the institution," *id.*

The Committee on Mental Defectives, while expressing gratitude for this legislation, "recommend[ed] increased provision at the Farm Colony for Feeble-Minded" in order for the state "to provide adequately for such cases as cannot, without *menace to the community*, be provided for in the home or the public school." MENTAL DEFECTIVES IN INDIANA: THIRD REPORT OF THE INDIANA COMMITTEE ON MENTAL DEFECTIVES 8 (1922).

The exact nature of the menace was described by the Governor's Committee as follows: "The uncared-for insane, epileptic and feebleminded constitute a social menace, but the *part played by the feebleminded in discounting social progress is by far the most potent influence for evil under which society is struggling today. . . .*

Modern theory grants that the rights of the individual must not interfere with the welfare of the community. From the latter standpoint, the mental defective must be considered as a possible financial burden to the community, a potential menace through the commission of crime, and an increasing detriment to the race through the propagation of his kind. . . . What subject is more vital than this to the people of our state? The menace of the mental defective is a real and pressing one. All individuals and organizations interested in human welfare are urged to cooperate in a state-wide program for *informing the citizens of our state concerning the dangers that threaten*, and awakening them to the disastrous consequences if this important matter is neglected. This should result in such united action as will lessen the burden of pauperism, degeneracy, disease and crime, and decrease the cost to the taxpayers." *Id.* at 6.

In addition to appropriating the increased funds requested for segregation, the legislature, on March 3, 1931, passed "AN ACT providing for the sexual sterilization of feeble minded persons." 1931 Ind. Acts 116, ch. 50. Indiana has been the first state in the country to enact a sterilization law. 1907 Ind. Acts 877, ch. 215. The new law provided that, *at the point at which commitment of any mentally retarded person was sought*, "it shall be the duty of each of the examining physicians appointed by the court" to "certify to the court whether, in his opinion, such person is the probable potential parent of mentally incompetent *or socially inadequate* offspring likewise afflicted." *Id.* § 1. Upon a finding by the court that "the welfare of society and of such feeble-minded person will be promoted by his or her sterilization," the superintendent "may have performed upon such feeble-minded person" sterilization surgery "at such time as he may deem expedient." *Id.* § 3.

Iowa. On March 17, 1876, the General Assembly of Iowa enacted legislation "FOR THE ESTABLISHMENT OF AN ASYLUM FOR FEEBLE MINDED CHIL-

DREN." 1876 Iowa Acts 145, ch. 152. Admission was originally limited to "children between the ages of seven and eighteen." *Id.* at 148, § 15. After the turn of the century, the state authorized the segregation of increased numbers of retarded people. The first to be confined, by enactment of April 7, 1902, were "all feeble-minded women under forty-six years of age." 1902 Iowa Acts 73, ch. 118. The next were "all feeble minded men under 46 years of age." 1909 Iowa Acts 171, ch. 173. In 1921, all age restrictions were repealed. 1921 Iowa Acts 126, ch. 129. State officials continually campaigned for the expansion of facilities for segregation, *see, e.g.*, TWENTY-FOURTH BIENNIAL REPORT OF THE SUPERINTENDENT OF THE IOWA INSTITUTION FOR THE FEEBLEMINDED 7-8 (1922).

On April 13, 1929, the General Assembly enacted legislation "to create a state board of eugenics, to define the powers and duties of said board, [and] to fix the procedure in the sexual sterilization of persons." 1929 Iowa Acts 106, ch. 66. The members of the Board of Eugenics, which consisted of not only the superintendents of state institutions, but also the commissioner of public health, were ordered to "report to the state board of eugenics the names of all persons, male or female, living in this state, of whom he or she may have knowledge, who are feeble-minded . . . and who are a menace to society." *Id.* § 2.

Kansas. In 1881, the Legislature of Kansas established "the Kansas state asylum for idiotic and imbecile youth." 1881 Kan. Sess. Laws 74, ch. 35. Admission was limited to those "not over fifteen years of age." *Id.* at 75, § 6.

The superintendent of the institution, I.W. Clark, in 1906 urged the adoption of a law to enlarge the institution and to accomplish the segregation of feeble-minded persons of all ages. THIRTEENTH BIENNIAL REPORT OF THE KANSAS SCHOOL FOR FEEBLE-MINDED YOUTH, WINFIELD, KANSAS, FOR THE TWO YEARS ENDING JUNE 30, 1906, at 6 (1906). According to Superintendent Clark:

"Legislative attention to a more extended provision for the idiotic and feeble-minded is an imperative demand upon the state. For a score of years the opinions of philanthropists and of those interested in sociologic work have been steadily advancing in a certain direction, until now they are unanimously convinced that *as a matter of public policy all the feeble-minded class should be segregated and provided for by the state*. Various are the reasons which have led up to this conviction, and to most persons they are easily obvious. In this state to-day there are in the county-houses, and *in the communities at large, a large number of this class who are a menace, a blight and a misfortune both to themselves and to the public.*" *Id.* at 12. Therefore, the superintendent recommended that "[t]he age limit of fifteen years should be removed, and the capacity of the home be enlarged so as to receive *all persons who are feeble-minded, regardless of age.*" *Id.* at 6.

On March 12, 1909, the legislature acted. The name of the institution was "hereby changed to the State Home for Feeble-minded," and "[a]ll inmates admitted to said institution" were placed "under the custody and control of the superintendent of said institution, and the superintendent may restrain any such inmate when he deems it necessary for the welfare of such inmate and the proper conduct of the institution." 1909 Kan. Sess. Laws 560-61, ch. 233, §§ 1, 2.

In 1917, the legislature enacted a law providing that, if the Superintendent of the State Home for Feeble-minded "shall certify in writing" to the institution's governing board "that he or she believes that the mental or physical condition of any inmate would be improved thereby or that procreation by such inmate would be likely to result in defective or feeble-minded children with criminal tendencies, and that the condition of such inmate is not likely to improve so as to make procreation by such person *desirable or beneficial to the state,* [then] it shall be lawful to perform a surgical operation for the sterili-

zation of such inmate." 1917 Kan. Sess. Laws 443, ch. 299, § 1.

State officials applauded this legislation, and predicted a marked decrease in the number of feeble-minded persons. However, they reported that "the decrease will be nothing like so great as it should be *unless our immigration laws are so changed as to greatly reduce the number of undesirables from Europe entering this country*. . . . We shall be disappointed further that the decrease is no greater on account of the ease with which feeble-minded persons may obtain a marriage certificate, enter the marriage state and rear a family like unto themselves. . . . Asexualization will be condemned by some as being too harsh a measure, but it becomes incumbent on those who would discourage it to offer something better, for the future will compel us to act. If society by her philanthropic efforts annuls the law of the survival of the fittest, then self-interest will compel her to adopt measures which will prevent the multiplication of those who at best can only add degeneracy to the race." TWENTIETH BIENNIAL REPORT OF THE STATE TRAINING SCHOOL FOR THE TWO YEARS ENDING JUNE 30, 1920, at 7-8 (1920).

Two years later, the superintendent reported "that the population of the institution has grown steadily," and noted "the increased activity of welfare and Red Cross associations over the state that are *constantly on the lookout* for unfortunate people, both young and old" to be institutionalized. TWENTY-FIRST BIENNIAL REPORT OF THE STATE TRAINING SCHOOL FOR THE TWO YEARS ENDING JUNE 30, 1922, at 3 (1922). As a result of the state's policies, people were persuaded to place their retarded relatives in the institution. The Superintendent noted that "as a consequence our ward buildings are becoming crowded, some wards housing twenty per cent more than the estimated capacity. Additional ward room is a necessity." *Id.* at 11.

Kentucky. The General Assembly of the Commonwealth of Kentucky first chartered the "Kentucky Institution for Feeble-minded Children" as a corporate entity in 1894, although the facility apparently had been in existence previous to that date. *See* 1894 Ky. Acts 96, ch. 48, art. I, § 1. Admission to the institution at that time was limited to persons aged six through eighteen "whose mental condition is such that, in the judgment of the superintendent, they may be taught to read and write, or can be educated or trained to do work." *Id.* at 115, art. III, § 5.

In 1918, the General Assembly enacted more malevolent legislation, entitled "AN ACT to provide for the commitment, care, treatment, training, *segregation* and custody" of "feeble-minded" persons. 1918 Ky. Acts 156, ch. 54. The law defined "feeble-minded person" as one who "requires supervision, care, training, control or custody for his own welfare or for the welfare of others *or the community.*" *Id.* § 1. It also established and authorized "The Farm Colony for the Feeble-Minded," including an ambitious plan for new construction on a 500-acre site. *Id.* at 156-57, 159-60, §§ 1, 9, 10. Proceedings to confine a person in the institution could be instituted against any person in the county who appears to be . . . feeble-minded." *Id.* at 161, § 16. The same law made it "one of the special duties of every *health officer and of every public health nurse to institute proceedings to secure the proper segregation and custody of feeble-minded persons,* likely to become fathers or mothers of other feeble-minded persons," *id.*, at 171, § 30, and made it a crime "to aid or abet the marriage of any feeble-minded person, and any person found guilty of aiding or abetting such marriage shall be fined not less than fifty dollars, nor more than five hundred dollars,"*id.* § 32.

Michigan. In 1893, the Michigan Legislature established the "Home for the Feeble-Minded and Epileptic." 1893 Mich. Pub. Acts 412, No. 209. The institution was available to "[a]ll feeble-minded and epileptic persons be-

tween the ages of six and twenty-one." *Id.* at 416, §§ 20, 21.

In 1905, to insure long-term segregation, the legislature required that parents and guardians admitting their children to the home "*waive all right to remove* such inmate thereafter either permanently or for a limited time." 1905 Mich. Pub. Acts 169-70, No. 121.

A more comprehensive revision of the law took place four years later, 1909 Mich. Pub. Acts 189, No. 101, eliminating age restrictions, *id.* at 192, § 13, providing for roving physicians "empowered to go where such feeble-minded and epileptic person may be and make such personal examination of him as to enable them to offer an opinion as to his mental condition" in order to certify them as "feeble-minded," *id.* § 14.

If, following a hearing, "such person shall be found and adjudged to be feeble-minded or epileptic the court shall immediately issue an order for his admission to the home for the feeble-minded." *Id.* at 194.

State officials described the value of the new law in maintaining life-long segregation and control in their report to Governor Woodbridge Ferris: "Prior to the enactment of the law of 1909, patients were admitted to this institution by direct application either by parents, guardians, or certain public officials. The matter of the status of these patients was constantly before the Board of Control. The Board found it impossible to *hold certain cases where, in their opinion, the welfare of the State would dictate their being held.* We therefore went to the Legislature, requesting the passage of an act bringing all these cases, where the patient had not had his day in court, before the Probate Courts of the several counties for review and legal commitment. We now have no patients not committed by the Probate Court." TENTH BIENNIAL REPORT OF THE BOARD OF CONTROL OF THE MICHIGAN HOME AND TRAINING SCHOOL AT LAPEER FOR THE BIENNIAL PERIOD ENDING JUNE 30, 1914 (1914).

As John N. McCormick, Chairman of the State Board of Corrections and Charities later stated in official, published instructions to Dr. H. A. Haynes, Superintendent of the Michigan home: "The members of this Board consider it imperative that ample provision be made for the *segregation* and proper care of feeble-minded persons. A recent survey of Michigan removes any doubt as to *the plain duty of the State regarding feeble-mindedness*, not only from a sociological but an economical standpoint as well. From our discussion of the situation with you at the meeting of this Board held at your institution, we are of the opinion that the items stated in your estimate of appropriations for the next two years are needed, and the same are hereby approved." ELEVENTH BIENNIAL REPORT OF THE BOARD OF CONTROL OF THE MICHIGAN HOME AND TRAINING SCHOOL AT LAPEER FOR THE BIENNIAL PERIOD ENDING JUNE 30, 1916, at 7 (1916).

On May 25, 1923, the Michigan legislature adopted "AN ACT to authorize the sterilization of mentally defective persons," which class was "deemed to include idiots, imbeciles and the feeble-minded, but not insane persons." 1923 Mich. Pub. Acts 453, No. 285, § 1. "Whenever a person is adjudged defective," the court was authorized to "order such treatment by x-rays or operation of vasectomy or salpingectomy. . . ." *Id.* at 454, § 2.

In a 1929 amendment, the legislature "hereby declared [it] to be the policy of the state to prevent the procreation and increase in number of feeble-minded, insane and epileptic persons, idiots, imbeciles, moral degenerates, and sexual perverts, *likely to become a menace to society* or wards of the state. *The provisions of this act are to be liberally construed to accomplish this purpose.*" 1929 Mich. Pub. Acts 689-90, No. 281, § 1. The law made it "the duty" of state officials operating the Home for Feeble-minded "to bring to the attention of the governing board or body of such institution and to the state welfare commission" any "mentally defective person who would be likely to procreate children unless

closely confined or rendered incapable of procreation" for whom they were "of the opinion" that it would be "for the best interest of such person *and of society* that such mentally defective person should be sexually sterilized." *Id.* at 690, § 4. The law made it "the duty," in turn, of "the governing board or body of such institution and the state welfare commission to cause an investigation, and examination to be made to determine whether such mentally defective person would be likely, *if allowed to mingle in society*, to procreate children having an inherited tendency to feeble-mindedness, insanity, idiocy, imbecility, epilepsy, or sexual degeneracy, and who *would be likely to become a social menace* or a ward of the state, and whether there is no probability that the condition of such person would improve to such an extent as to avoid such consequences." *Id.* at 690-91.

Minnesota. In 1909, the legislature of Minnesota enacted a law "providing a department for incurables" for "all idiotic and epileptic persons resident of the state. . . " 1909 Minn. Laws 72, ch. 80. A decade later, because the institution, located at Faribault, had filled beyond capacity, the legislature authorized the state board of control "to select from the public lands of this state, the title to which is vested in the state, not to exceed two (2) sections of land to be used as a location for a colony for feeble-minded persons. . . . " 1919 Minn. Laws 475, ch. 407, § 1. In 1925, the legislature authorized residents of its institutions "to be sterilized by the operation of vasectomy or tubectomy." 1925 Minn. Laws 140, ch. 154.

Missouri. In 1899, the "Missouri Colony for the Feeble-minded" was established. 1899 Mo. Laws 1821, ch. 118, art. 10. As the institution's population grew, the "board of managers of said colony" was "empowered to establish other colonies in temporary or permanent camps." 1919 Mo. Laws 183-84, § 2.

State officials continually requested increased appropriations for expansion. In one annual report to the legislature, for example, Dr. E. E. Brunner, superintend-

ent of the institution, stated: "We need another building to care for the custodial type of idiot patients as that building is entirely overcrowded." SIXTH BIENNIAL REPORT OF THE BOARD OF MANAGERS OF THE STATE ELEEMOSYNARY INSTITUTIONS TO THE FIFTY-SEVENTH GENERAL ASSEMBLY OF THE STATE OF MISSOURI FOR THE TWO FISCAL YEARS BEGINNING JANUARY 1, 1931, AND ENDING DECEMBER 31, 1932, at 291 (1933). According to Superintendent Brunner, "[t]he number of applications is not an indication that the number of feeble-minded is on the increase in the State, but to the education of the people of the State as to *the significance of feeble-mindedness and the need of permanent custodial care. . . .*" *Id.* at 288.

Nebraska. On March 5, 1885, the Legislature of Nebraska passed "AN ACT to establish and endow an Asylum Home for feeble-minded children and adults at or near the city of Beatrice, Nebraska, and making appropriation and levy therefor." 1885 Neb. Laws 255, ch. 52.

By 1914, Silas A. Holcomb, chairman of the newly established state Board of Commissioners, was writing in his first report to the governor and legislature that "[t]he population of the institution has increased to the point where its capacity is taxed to the limit. The demand for additional admissions is steady and will continue." The Board recommended an ambitious expansion program, "[w]ith a view of relieving the congested condition and making suitable provisions for future admissions. FIRST BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS OF STATE INSTITUTIONS TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF NEBRASKA FOR THE BIENNIUM ENDING NOVEMBER 30, 1914, at 9 (1915).

Expanded institutions would be necessary partially as a result of projected population increases for the state. *See id.* They would also be the necessary result, however, of a comprehensive program "submit[ted] for the serious consideration of the Governor and the legislature" of testing and registration which "would unquestionably re-

veal others who are feeble-minded and who *ought not to be returned to society.*" *Id.* at 10.

Observing that "[t]he *only effective measures* to meet these conditions are *segregation and sterilization,*" the Board criticized the then current law: "but in our state neither of these may be applied except as a voluntary proceeding on the part of the legal guardian of the feeble-minded person. . . . It is not a proceeding by which a feeble-minded person may be committed to nor detained in the institution *against the desire* of the parent or guardian." *Id.* at 11. By amending the law, "*the community is enabled to seclude those who cannot safety be allowed to mingle freely with their fellows.* We, therefore, recommend that a statute, similar to those above mentioned, be enacted by this state to provide that admission to the institution for feeble-minded be by order of commitment entered by the county court of the proper county, after due hearing and finding upon a petition filed by the husband, wife, parent, guardian or other person standing in loco parentis to the alleged feeble-minded person, *or* by the superintendents, managers or trustees of any institution having such person in charge, or by the county commissioners, county attorney, superintendent or principal of schools, or a probation officer of the county in which such alleged feeble-minded person shall reside." *Id.* at 11-12.

The legislature responded, enacting an amendment on April 14, 1915, extending the list of people eligible to initiate commitment proceedings to include "the county commissioners, county attorney, any poor law official, any superintendent or principal of schools, or any probation or parole officer of the county of which such idiotic, imbecile or feeble-minded person is a bona fide resident, . . . and the superintendent or managing officer of any public or charitable institution having in charge any idiotic, imbecile or feeble-minded person." 1915 Neb. Laws 294, ch. 131. "[D]etention" was mandated if "it shall appear that the person named in the application is an idiot,

an imbecile or a feeble-minded person and that the best interests of such person *or the welfare of society* require that he be committed to said institution for the feeble-minded." *Id.* at 295."It shall be the duty of said institution to receive all such idiotic, imbecile and feeble-minded persons duly committed thereto and to detain them therein, and to arrest and return any who may escape therefrom." *Id.*

Shortly thereafter, the lawmakers passed "AN ACT to authorize the sterilization of feeble-minded," whose "children would probably become a social menace" and "would be harmful to society." 1915 Neb. Laws 554-55, ch. 237. The act was not approved by the governor, but became operative without his signature.

In 1921, the legislature changed the name of the institution from the "Nebraska Institution for Feeble-minded Youth" to simply the "Nebraska Institution for the Feeble-minded," in recognition of the abandonment of all age restrictions. 1921 Neb. Laws 843, ch. 241, § 1. "The objects of the institution shall be to provide *custodial care* and humane treatment for those who are feeble-minded, *to segregate them from society*, to study to improve their condition, [and] *to classify them*." *Id.*

North Dakota. The Legislative Assembly of North Dakota in 1903 adopted "AN ACT to Establish an Institution for the Feeble Minded," to be "permanently maintained at or near the city of Grafton" for "*all* idiotic and epileptic persons residents of this state." 1903 N.D. Sess. Laws 142, 143, ch. 108, §§ 1, 6. State Superintendent L. B. Baldwin reported that it was "advisable that they be placed in institutions of this character *for life*. A relationship exists between the forms of degeneracy, namely, the criminal, the inebriate, the prostitute and the feeble minded." The view of state officials was that "to protect posterity," it was necessary to undertake "the gathering of this great number of defectives into institutions and colonies." FIRST BIENNIAL REPORT OF THE NORTH DA-

KOTA INSTITUTIONS FOR FEEBLE MINDED AT GRAFTON FOR THE PERIOD ENDING JUNE 30, 1904 TO THE GOVERNOR OF NORTH DAKOTA 9-10 (1904).

In 1909, the Legislative Assembly promoted the permanent segregation of those committed by providing that "any inmate of such institution shall not be removed therefrom," except by written application, and "said request must receive the approval of the superintendent before such inmate can be removed." 1909 N.D. Sess. Laws 317-18, ch. 213, § 1.

In 1913, the legislature provided that "any feebie minded person who is *offensive to the public peace or to good morals, and who is a proper subject for classification and discipline in the institution,* may be committed" without consent. 1913 N.D. Sess. Laws 222, ch. 166, § 1. This provision was enacted as an emergency measure in view of "the fact that there is now no law for compulsory commitment of feeble-minded persons *obnoxious to the peace and good morals of the public.*" *Id.* § 3.

The Legislative Assembly authorized the superintendent to "admit to the institution temporarily, without commitment, under such rules and regulations as the Board of Administration may prescribe, for purposes of observation, such children or adults as are *suspected of being feeble minded or idiotic,* to ascertain whether or not such person is actually mentally defective and a proper case for care, treatment and training in an institution for the feeble-minded." 1921 N.D. Sess. Laws 123, ch. 64.

It was also made "the duty of the superintendent" to "report quarterly to the Board of Examiners herein provided for, all feeble-minded" who were considered as having "potential to producing off-spring, who, because of inheritance of inferior or antisocial traits, *would probably become a social menace. . . .*" 1927 N.D. Sess. Laws 433, ch. 263, § 1. The Board would, following a hearing, "make an order requiring such person to be sterilized." *Id.* at 434, § 3. The purpose of the law was to "*protect society from the menace* of procreation by said inmate." *Id.* § 5.

Ohio. As early as 1857, the General Assembly of Ohio established the "Ohio State Asylum for Idiots." 1857 Ohio Laws 190, 191.

In 1898, Ohio lawmakers established "a custodial department" for the "detention" of "idiotic and feeble-minded children *and adults*," 1898 Ohio Laws 209, § 1, and established an involuntary commitment procedure, *id.* at 211, § 6.

In 1912, Superintendent E. J. Emerick called for increased facilities. "If we could *segregate* these defectives when they are young and *keep them confined during their natural lives*, it would obviate the expense of having them committed repeatedly to our penitentiaries when they grow older. Under our present plan they are sent to our penal institutions for a short term after committing some crime, allowed to go out again, scatter their progeny and commit other crimes and depredations, only to be recommitted time after time. . . . If we take these children into our institution, brighten them up as best we can, and turn them loose on the public, it has not only been a waste of time, money, and energy, but we have done the world an irreparable injury." Emerick, *The Segregation of the Defective* in PROCEEDINGS OF THE NATIONAL EDUCATION ASSOCIATION, 1912, at 1291-92 (1912). Emerick and others continued the same theme for the next several years. *See* E. J. EMERICK, THE PROBLEM OF THE FEEBLEMINDED (1913); JUVENILE PROTECTIVE ASSOCIATION OF CINCINNATI, THE FEEBLEMINDED, OR, THE HUB TO OUR WHEEL OF VICE (1915); M. SESSIONS, THE FEEBLEMINDED IN OHIO (1918).

In 1919, the legislature established "an additional institution in the state for the *custody, supervision, control*, care, *maintenance*, and training of feeble-minded persons," to receive "feeble-minded persons committed to its custody and care *from any county in the state*." 1919 Ohio Laws 430, § 1.

South Dakota. South Dakota's first facility for the segregation of retarded people was a department of the

Northern Hospital for the Insane established as early as 1893. 1893 S.D. Sess. Laws 169, ch. 101. In 1917, the legislature enacted the state's first sterilization law, making it "the *duty*" of the State Board of Charities and Corrections to order the sterilization of "*any* of said inmates [who] would produce children with *a tendency* to disease, feeble-mindedness, idiocy or imbecility. . . ." 1917 S.D. Sess. Laws 378-379, ch. 236, § 2.

In 1921, the legislature passed an act "RELATING TO THE SEGREGATION OF FEEBLE MINDED." 1921 S.D. Sess. Laws 344, ch. 235. The law created the State Commission for the Control of the Feeble Minded and empowered it "to make all necessary rules and regulations pertaining to the *segregation,* care *and control* of feeble minded persons. . . ." *Id.* §§ 1, 3. It was "the purpose of this act to provide that *all feeble minded persons resident within this state shall become the wards of the state and shall be kept segregated.*" *Id.* § 2. In order to enforce this mandate, the "state commission shall make a survey of all state institutions *and of the state generally* to ascertain the persons whom they believe to be feeble-minded in order that said state commission may make necessary complaints to the county commission." *Id.* at 344-45, § 5. Additionally, "[a]ll teachers" were required to "report *all feeble-minded children coming to their attention* to the state board." *Id.* at 345. This system of outreach efforts to systematically segregate retarded people became known nationwide as the "South Dakota Plan," and became a model for similar efforts in other states. The legislation was deemed by the Commission to "constitute a substantially laid foundation upon which to erect the super-structure of a wise social and economic administration of the feeble-minded problem." STATE OF SOUTH DAKOTA, SECOND BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1928 TO THE GOVERNOR 2 (1928).

The Commission proposed legislation to require the "identification of all feeble-minded in the state and their registration as a matter of record [,] . . . a continuative census [,] . . . supervision and control by properly constituted authorities [,] . . . [and] the operation of the sterilization law and the anti-marriage law. In fact the law is designed to give *the defective* the protection of the state, and at the same time *to protect the state against his social inadequacy*." STATE OF SOUTH DAKOTA, THIRD BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1930 TO THE GOVERNOR 3 (1930). The Commission warned that the proposed legislation was necessary due to the large numbers of "feeble-minded" who were "at large and uncontrolled by the state." *Id.* at 4.

On February 19, 1931, the comprehensive law requested by the Commission was enacted. The term "feeble minded" was broadly and vaguely defined to include "*all individuals*, except the insane, who by reason of mental deficiency are incapable of doing the work of the grades in the public schools *in a reasonable ratio to their years of life; or* who by reason of mental deficiency and other associated defects are incapable of making *the proper adjustments to life* for one of their chronological age." 1931 S.D. Sess. Laws 200, ch. 153, § 1. The Commission drafted into the law its paramount "authority in all matters pertaining to the care, supervision, and control of all feeble-minded persons in the State of South Dakota not confined within the state school and home for the feeble minded. Said commission shall determine the conditions under which such feeble minded persons shall be permitted to remain outside of said institution; and when, and under what conditions, commitment to such institution shall be required." *Id.* § 2. The Commission was given "the duty" to "maintain a continuative census of the feeble minded in the state, and all boards of education, school principals, county superintendents of

schools, city school superintendents, and teachers, are hereby specifically required to give said commission, or its agents, *such access as the commission, or its agents, deem necessary* to all school records, and to *all children* within their control for purposes of examination. . . ." *Id.* § 3(a). Moreover, it was to "be the duty of *all* teachers, city school superintendents and county superintendents of schools" as well as "the duty of *all* doctors, nurses, hospitals, penal and charitable institutions, county welfare boards, public health officers, and public officers, boards, or commissions within the State of South Dakota, to report to the state commission for the control of the feeble minded the name, age, and residence of *all children believed by them to be feeble minded,* and also to furnish whenever requested by the state commission for control of the feeble minded *any and all information* which they may have relative to the name, age, residence and antecedents of any person believed to be feeble minded." *Id.* § 3(b), (c). "Sub-Commissions," were established in each county of the state "under the direct authority of the state commission" with the "specific authority" to "*apprehend, examine, commit, establish guardianships, transport, and maintain the custody* of *any feeble minded person* within their respective counties." *Id.* at 200-01, § 4. "It shall also be the duty of each sub-commission to declare to be feeble minded all of those persons whom the sub-commission, or whom a majority of the members of such sub-commission, find upon investigation and examination to be feeble minded; and forthwith to commit such feeble minded to the supervision and control of the state commission. . . ." *Id.* at 201, § 6.

This legislation, according to the Commission, "would serve the purpose of *securing control and supervision of all the feeble-minded outside of institutions in the State.*" STATE OF SOUTH DAKOTA, FOURTH BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PE-

RIOD ENDING JUNE 30, 1932 TO THE GOVERNOR 3 (1932). "[T]he Commission was thoroughly convinced that the *great problem of feeble-mindedness* lay in that large group of feeble-minded *outside of institutions*," who were "scattered throughout the population" and "*in possession of all the rights and liberties of normal people.*" *Id.* The Commission found that most of "the feeble-minded were at large and uncontrolled by the State," *id.*, but that would change: "To have control there must be: 1st, Identification; 2nd, Examination; 3rd, Registration; 4th, Supervision; 5th, Prevention (of marriage); 6th, Sterilization. The new law is designed to fulfill these requirements." *Id.*

Commission personnel "were sent into the various counties and through contact with the schools, welfare boards, health officers, social agencies, physicians, nurses, and public agencies of every kind, sought to *locate every possible feeble-minded individual.*" *Id.* at 9.

Two years later, the Commission reported "the number who have been committed to the State Commission, *those who are segregated in the institution and those who have been sterilized, are now all under State Control.*" STATE OF SOUTH DAKOTA, FIFTH BIENNIAL REPORT OF THE STATE COMMISSION FOR THE CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1934 TO THE GOVERNOR 5 (1934). The Commission complained, though, that the state's sterilization law was "much too complicated and cumbersome to achieve the best results." *Id.*

The legislature agreed, enacting legislation the following February giving each Sub-Commission, following a hearing, "the power to make an order for the sterilization of any feeble-minded person found within its respective county. . . ." 1935 S.D. Sess. Laws 163, ch. 113, § 1. A petition for sterilization could be "filed with the Chairman of the Sub-Commission of the County in which

the person believed to be feeble-minded is found," by "*any resident* of the County in which such person may be found." *Id.*

The "South Dakota Plan" was in effect in similar form at least through 1968. *See* STATE OF SOUTH DAKOTA, TWENTY-SECOND BIENNIAL REPORT OF THE STATE COMMISSION FOR THE MENTALLY RETARDED FOR THE PERIOD ENDING JUNE 30, 1968 TO THE GOVERNOR (1968).

Wisconsin. Public support in Wisconsin for segregation of retarded people did not begin in earnest until the 1890s. Among those lobbying for the establishment of an institution, through a state-wide petition drive, were the Board of Health, the Federation of Women's Organization, and the State Teachers Association. One such petition, signed by the leading citizens of Washburn County in 1891, called for the building of an institution "for the feeble-minded, who are a constant menace to the good order of society, and to social and domestic safety and tranquility. . . ." *Quoted in* A. RUGG, ONE HUNDRED YEARS OF PUBLIC CARE FOR PEOPLE WITH MENTAL RETARDATION IN WISCONSIN 8 (1983).

Dr. J. H. McBride, a member of the Wisconsin Conference of Charities and Corrections, stated the popular belief that retarded children should be removed from the family: "That an idiot child is, with *its repulsive appearance* and disorderly habits, *a demoralizing association for brothers and sisters,* a thing that would seem to go without saying. Daily experience with the course and rude behavior of an idiot is an experience that must, of necessity, be seriously injuring to young and tender natures." PROCEEDINGS OF THE WISCONSIN CONFERENCE OF CHARITIES AND CORRECTIONS 118 (1890).

In 1895, the legislature established "The Wisconsin Home for feeble-minded." 1895 Wis. Laws 280, ch. 138, § 1. The facility was for "[a]ll feeble-minded, epileptic and idiotic persons, residents of the state." *Id.* at 241, § 4. The law was amended in 1897, to provide that "when-

ever it shall appear that any feeble-minded female of child-bearing age is, by reason of her condition, a menace to society, it is the duty of the supervisor to bring the person before the county judge. . . ." 1897 Wis. Laws, ch. 360, § 1.

In his first biennial report, Superintendent Alfred W. Wilmarth requested of the legislature increased appropriations for additional dormitories in order to "*purge society* and obstruct the increase of feeble-mindedness." WISCONSIN BOARD OF CONTROL, BIENNIAL REPORT 321 (1898). What training that was provided focussed upon "educating the child as a useful member of the *institutional* community *where he will always live.*" WISCONSIN BOARD OF CONTROL, BIENNIAL REPORT 356 (1904). Indeed, Superintendent Wilmarth complained in his report of the "annoyance . . . created by friends of some children who demand their release when they are *entirely unfit to go into general society.*" *Id.* at 376.

By 1912, state officials were reporting that the work of the institution basically "consist[ed] of *separating them from society,* feeding, and clothing them." WISCONSIN BOARD OF CONTROL, BIENNIAL REPORT 20 (1912). That same year, "the Board of Control was directed not to consider 'paroling' anyone who 'might' become a menace to the community." *Id.*

A Visiting Committee of the legislature endorsed the continuation and extension of this approach and, in addition, urged the enactment of a sterilization law because of the "present danger to the race." *Report of the Legislative Visiting Committee,* SENATE JOURNAL 263 (48th Leg. Sess.). In 1913, the legislature authorized the sterilization of residents of the institution for whom it was found "that procreation is inadvisable." 1913 Wis. Laws 972, ch. 693, § 3. The same day, the lawmakers made room for the incarceration of more "feeble-minded" by establishing a second institution. *Id.* at 963, ch. 689, § 1. It was needed since the population of the Home for the Feebleminded increased from 394 to 1060 in the period

1900-1920. WISCONSIN BOARD OF CONTROL, BIENNIAL REPORT 290 (1920).

Southern States

Alabama. On September 29, 1919, the legislature of Alabama established "The Alabama Home" for "mental inferiors." 1919 Ala. Acts 738, No. 568, § 2.

"[D]eclared to be mental inferiors or deficients, or feeble-minded" by the legislature for purposes of confinement at the Home were "[a]ll persons of *whatever age*, who are *deficient or inferior* to the extent of being classed in either of the following groups of the feeble-minded: That is to say, idiots, imbeciles, feeble-minded or morons, and any of whom may be, or may not be epileptics, but not violent or insane."

Id. at 739, § 7. The terms "feeble-minded" and "mental inferior or deficient" were defined in the act to "include every person with such a degree of mental defectiveness from birth, or from an early age that he is unable to care for himself and to manage his affairs with ordinary prudence, *or that he is a menace to the happiness* or safety of himself *or of others in the community*, and requires care, supervision, and control either for his own protection *or for the protection of others.*" *Id.*

The courts were given "the power and authority to commit such person to the Home *notwithstanding* the family or relatives may object thereto." *Id.* at 740, § 9.

The same enactment also instructed the operators of the Alabama Home, that, if "they deem it advisable they are hereby authorized and empowered to sterilize any inmate." *Id.* § 13.

The law provided that "[t]he Superintendent must not grant a parole to any inmate unless he is of the opinion that it will not be detrimental to such inmate *or to society*, and the Superintendent must recall said parole whenever he is satisfied that the welfare of such paroled

inmate, *or of the community to which said inmate is paroled* requires it." *Id.* § 14.

Arkansas. Arkansas' institution "for the Feeble-Minded" was created by an act of the legislature on March 6, 1917. 1917 Ark. Acts 942.

The law broadly defined "feeble-minded" for the purposes of confinement at the institution "to include *all degrees of mental defect* due to arrested or imperfect mental development. Those feeble-minded persons possessing approximate mental development not to exceed that of a normal child of three, shall be classed as 'idiots;' those approximately of the mentality of children from four to seven, inclusive, shall be known as 'imbeciles;' and those approximately with the mental development of normal children from eight to twelve, inclusive, shall be known as 'morons.' " *Id.* § 11.

Florida. In 1919, the Florida Legislature, noting "an alarming state of facts" in a report submitted to it by a committee appointed by the governor (*see* 1915 Fla. Laws 263, ch. 6920), and further noting "[f]rom the findings of the said Committee there can be no doubt that there should be established and created in this State an Institution for the care of Epileptic and Feeble-Minded, where they can be segregated," established the "Florida Farm Colony for Epileptic and Feeble-Minded." 1919 Fla. Laws 231, ch. 7887, preamble & § 1.

The Colony was founded "to the end that these unfortunates may be prevented from reproducing their kind, *and the various communities and the State at Large relieved from the heavy economic and moral losses arising by reason of their existence.*" *Id.* § 8. Its purpose was "for *the segregation*" of the "feeble-minded." *Id.*

Georgia. On August 19, 1919, the General Assembly of Georgia passed "An Act to establish in the State of Georgia an institution to be known as the 'Georgia Training School for Mental Defectives.' " 1919 Ga. Laws 377, No. 373. The institution was ordered built "as soon as

possible" for all "defectives" who "constitute *menaces* to themselves *or the community.*" *Id.* § 1.

The statute mandated that "preference in admission shall be given to children and women of child-bearing age," but the institution was open to *any* "defective" who "constitutes *a menace to the happiness* of himself or *of others in the community*" who were "not insane or of unsound mind." *Id.* at 379, § 3.

The institution opened in 1921. A year later, its first superintendent, George H. Preston, M.D., complained that the facility was "not large enough to fulfill the demands made of it." ANNUAL REPORT OF THE GEORGIA TRAINING SCHOOL FOR MENTAL DEFECTIVES, GRACEWOOD GEORGIA 4 (1922). According to the Report, "the fact of primary importance to remember is that a defective child will be a defective adult, and will die a defective. There is not a philosopher's stone to turn the base metals of defect into gold." *Id.*

The Georgia legislature enacted the state's first sterilization law, "for the protection of . . . future generations," in 1937. 1937 Ga. Laws 414, No. 5.

Louisiana. The "State Colony and Training School" was established by the Louisiana legislature in 1918 as "an institution especially provided for the feeble-minded persons of the state of Louisiana." 1918 La. Acts, No. 141, § 1. A "[f]eeble-minded" person was defined as "any person afflicted with mental defectiveness" who "requires supervision, control and care for his own welfare, or for the welfare of others, *or for the welfare of the community*, who is not classifiable as an insane person." *Id.* § 2. "When any person residing in this state shall be supposed to be feeble-minded," and "it is unsafe and dangerous to the welfare of the community for him to be at large without supervision, control, and care, any relative, guardian or conservator *or any reputable citizen of the parish* in which such supposed feeble-minded person resides" was authorized to seek that person's commitment to the state colony. *Id.* § 11. The law required "the guid-

ing and controlling thought of the court throughout the proceedings" to be not only "the welfare of the feebleminded person" but also "the welfare of *the community*." *Id.* § 15.

Mississippi. On April 3, 1920, the Mississippi Legislature passed "AN ACT to provide for the establishment and maintenance of the Mississippi School and Colony for the Feebleminded . . . [and] to prevent the multiplication of feebleminded criminals and paupers." 1920 Miss. Laws 288, ch. 210. The law included in its definition of "feebleminded" those who "constitute *menaces to the happiness* or safety of themselves *or of other persons in the community*, and require care, supervision and control either for their own protection or for the protection of others." *Id.* §2. The enactment was based upon the legislative finding that "the greatest danger of the feebleminded to the community lies in the frequency of the passing on of mental deficiency from one generation to another, and in the consequent propagation of criminals and paupers." *Id.* at 289. "[A] sufficient acreage of the Rankin County state convict farm" was ordered selected and improved "as soon as practicable" for the establishment of the Mississippi Colony, bearing in mind the desirability of a large tract of land to provide for the growing demands of said institution." *Id.* at 290, §8. The "Plan of the Mississippi Colony" was to provide "the most economical production of shelter, with the necessary distribution of heat, light and food, at the same time securing *the isolation and segregation required*." *Id.* at 291, §9.

The chancery courts were given jurisdiction over "all cases of legal inquiry in regard to feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority which render the subjects *unfit for citizenship*." *Id.* at 294, §17. Application for commitment could be made "[a]t any time" by "any relative" to the clerk of the court, "but if the relatives of any feebleminded person shall neglect or refuse to make appli-

cation to the clerk of the chancery court to have him adjudged feebleminded, *and shall permit him to go at large,* the clerk of the chancery court shall, on the application, in writing and under oath, of a citizen of the county in question, issue a summons to the sheriff to summon the alleged feebleminded person and his parent, guardian, or next friend to contest the application." *Id.* An order of commitment was to issue if the court "shall be satisfied that the person is feebleminded, and that for the safety or happiness of the feebleminded himself, *or for the safety or happiness of other persons in the community,* he should be committed to the Mississippi Colony." *Id.* at 297, §23.

The legislature later authorized "the operation of sterilization" to be performed "whenever" the Mississippi Colony's superintendent "shall be of the opinion that it is for the best interests of the patients *and of society* that any inmate of the institution under his care should be sexually sterilized," 1928 Miss. Laws, ch. 294, §1 (emphasis provided), and that the board of trustees of the Colony "shall find that the said inmate" is "feeble minded or epileptic, and by the laws of heredity is the probable potential parent of *socially inadequate offsprings* likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate *and of society* will be promoted by such sterilization." *Id.* at 372, §2.

North Carolina. The General Assembly of North Carolina in 1911 established the "North Carolina School for the Feebleminded" for all persons "idiotic and feebleminded six years of age and upward." 1911 N.C. Sess. Laws 256, ch. 87, §1. The clerk of the county court was authorized to order commitment "[w]henever it is made to appear" that "any person resident in said county" was "a fit subject" for institutionalization. *Id.* at 257, §4. By a 1915 amendment, the General Assembly authorized commitment proceedings for children to be brought by, in addition to a parent or guardian, "third, by a guardian

duly appointed; fourth, by the superintendent of any county home, or by the person having the management of any orphanage, association, charity, society, children's home workers, ministers, teachers, or physicians, or other institutions where children are cared for. Under items third and fourth, *consent of parents, if living, is not required.*" 1915 N.C. Sess. Laws 337-38, ch. 266, §3.

According to state officials, "the aim of the institution" was "to *segregate*" all of "the state's mental defectives." THIRD BIENNIAL REPORT OF THE CASTLE TRAINING SCHOOL, KINSTON, N.C., FOR THE YEARS 1915-1916, at 13 (1916). "[I]f for a period of two or three generations mentally defective men and women were prevented by segregation or sterilization from propagating their kind, mental deficiency would be very materially decreased. . . ." *Id.* at 14.

By 1923, the General Assembly had authorized the commitment of "feeble-minded and mentally defective persons *of any age* when in the judgment of the officer of public welfare and the board of directors of said institution it is deemed advisable." 1923 N.C. Sess. Laws 223, ch. 34, §2.

Under 1929 legislation, the superintendent of the institution was "hereby authorized and directed to have the necessary operation for asexualization or sterilization performed upon *any* mentally defective or feeble-minded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, *or for the public good.*" 1929 N.C. Sess. Laws 28, ch. 34, §1.

Oklahoma. The Oklahoma legislature established the "Oklahoma Institution for the Feeble-minded" in 1909, for "*all* imbecile and idiotic persons of whatever state who are not insane." 1909 Okla. Sess. Laws 534-35, 536, ch. 34, art. 2, §§1, 4. Application for a commitment could be made by the father or mother, or: "Third: By a guardian duly appointed. Fourth: By the superintendent of any county alms house. Fifth: By the persons having

the management of any institution or asylum where children are cared for. Sixth: By the trustees of any township in Oklahoma. Under the items 'Three,' 'Four,' 'Five,' and 'Six' above, *the consent of parents is not required.*" *Id.* at 538, §8.

In 1931, the legislature authorized the superintendent of the institution to sterilize those "afflicted with" such conditions as "idiocy" or "imbecility." 1931 Okla. Sess. Laws 80, ch. 26, art 3.

South Carolina. On February 12, 1918, the General Assembly of South Carolina passed "AN ACT to Establish the State Training School for the Feeble-minded, and to Provide for Its Government and Maintenance." 1918 S.C. Acts 729, No. 398. Once the facility was built, the "Board of Regents shall notify the Governor, who shall thereupon by proclamation, declare the said Training School for the Feeble-minded ready to receive patients." *Id.* at 731, § 9.

The term "feeble-minded persons" was defined to mean "any moron, imbecile or idiotic person, of whatever grade, who is afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of competing on equal terms with his normal fellows or of managing himself or his affairs with ordinary prudence, and who, therefore, required custodial care and training for his own protection and for the welfare of others *and of the Community,* but who is not insane or of unsound mind. . . ." *Id.* at 731-32, § 10.

Institutionalization proceedings could be initiated by "any reputable citizen of this State" by filing "a petition in writing, setting forth that the person therein named is feeble-minded" and that it was "unsafe or dangerous to the welfare of the community for such person to be at large. . . ." *Id.* at 733, § 13.

State officials reported candidly to the General Assembly that the name of the facility was a misnomer since they "continue to forego" the provision of any "training of mental defectives" but "devote our efforts *mainly to seg-*

regating and giving physical care to as large a number as possible. . . ." FIFTH ANNUAL REPORT OF THE STATE TRAINING SCHOOL FOR THE FEEBLEMINDED, CLINTON, S.C., 1922, at 3 (1923).

As stated by Dr. B. O. Whitten, the Superintendent of the institution, "[i]n almost every instance the propagation of this element of society results in grief and disappointment to the persons in question and will scarcely ever operate in any way which can be expected to promote happiness *or even Anglo Saxon liberty*." SIXTH ANNUAL REPORT OF THE STATE TRAINING SCHOOL FOR THE FEEBLEMINDED, CLINTON, S.C., 1923, at 12 (1924).

In 1935, the legislature authorized the "sterilization of mental defectives." 1935 S.C. Acts 428, No. 304.

Tennessee. On April 14, 1919, the General Assembly of Tennessee passed "An Act to provide for the protection, care, *control, oversight, custody, maintenance* and training of feeble-minded persons; to define who are feeble-minded within the meaning of this Act; and for the establishment, construction and maintenance of the Tennessee Home and Training School for Feeble-Minded Persons." 1919 Tenn. Pub. Acts 561, ch. 150. The Act applied to "any person with such a degree of mental defectiveness" as to be "a *menace to the happiness* or safety of himself *or of others in the community*" who "comprise those commonly called idiots, imbeciles, and morons or high-grade feeble-minded persons" and who "may or may not be subject to epileptic seizures." *Id.* § 2.

"Any relative of a feeble-minded person may make application to have the person so adjudged; but if the relatives and friends of any feeble-minded person shall neglect or refuse to place him or her in the Tennessee Home and Training School for Feeble-Minded Persons, or in a private institution for the feeble-minded, and shall permit him or her *to go at large*, then *any reputable person* being a resident of the county in which such feeble-minded person is found may make application for com-

mitment in writing and under oath to any one of the courts of his county, as above mentioned and shall not be subject to exception or demurrer for defects of form." *Id.* at 564, § 4. It was "the *special duty* of every county health officer and of every County Superintendent of Education in the State to file application for the commitment of feeble-minded persons whose parents or guardians neglect such duty . . . whenever such officer shall have reasonable cause to believe that such commitment is necessary to secure the welfare of such feeble-minded persons *or of those persons with whom they come in contact.*" *Id.* § 5.

State officials acknowledged the legislation as a necessary enactment since "[o]f course, all will agree that there are very many feeble-minded in the State of Tennessee who have never gotten into one of the State institutions and are more or less a *menace and burden* to their respective communities." 1 Q. REP. ST. INSTITUTIONS 30-31 (1919).

Texas. Texas became the first southern state to segregate its retarded citizens when it opened in 1904 a special unit of the State Epileptic Colony, for "idiotic, imbecilic, and feeble-minded epileptics." Gaver, *Mental Retardation,* in MENTAL ILLNESS AND MENTAL RETARDATION: THE HISTORY OF STATE CARE IN TEXAS 20, 22 (1976).

In 1912, the Texas Conference on Charities and Corrections, which had been organized the previous year, presented in the last address of its annual conference a call by Professor Bird T. Baldwin of the University of Texas for an institution for the state's "mental defectives, who are *contaminating society by their presence,* absorbing time and thought that should be devoted to normal children, and later filling the almshouses, charitable institutions, and prisons with illegitimate and irresponsible offspring." Baldwin, *The Causes, Prevention and Care of Feeble-Minded Children,* in PROCEEDINGS OF THE STATE CONFERENCE OF CHARITIES AND CORRECTIONS AT ITS

SECOND ANNUAL MEETING HELD AT WACO, APRIL 14-16, 1912, at 86 (1912). According to Professor Baldwin, these "mental defectives or feeble-minded, who are *by-products of unfinished humanity, belong in an institution* where they may be cared for, made happy, and to some extent useful. They should be *segregated and not allowed to go to our schools with normal children* and should not be permitted to have offspring." *Id.* at 87-88.

The following year, the legislature heeded the call by enacting a bill establishing an institution for the "feeble-minded," but it was vetoed by the governor, apparently on budgetary grounds. This prompted a more concerted effort, again led by the State Conference on Charities and Corrections. Dr. C. S. Yoakum, Secretary of the State Conference, wrote a 156-page monograph calling for the enactment of this legislation. C. S. YOAKUM, CARE OF THE FEEBLE-MINDED AND INSANE IN TEXAS, BULL. U. TEX., NO. 369 (Humanistic Ser. No. 16, Nov. 5, 1914). The monograph called for the removal of "defectives" from the family since "[i]n a home where there is one feeble-minded child among a number of children, we have the definite effects of such communication. To be sure, we recognize the increase in sympathetic understanding that children and parents exercise toward such feeble-minded children; but these moral and social traits are infrequently developed and far overbalanced by the amount of time and energy required to care for such a child, especially if he be of the low grade imbecile or idiotic type. One writer states that we may figure without error that the time of one adult is needed for the care of every feeble-minded or low grade imbecile child or adult. In a custodial institution five of these defective children or adults may be cared for by a single attendant in a much better manner and with much better results than in the home. We are, then, by sending such children to institutions provided for their care, relieving four out of every five of the normal adults now busied in caring for such

defectives, for the economic and business life of the normal community." *Id.* at 44-45. Moreover, "[i]t is certain that the feeble-minded girl and boy are often the bearers of many of the social diseases, and it is especially true that feeble-minded girls are, in the large majority of cases, the inmates of our houses of prostitution." Thus, "the effect *upon the community* of the single individual of this type is bad in the extreme in so far as the social, economic, and moral ideals of that community are concerned." *Id.* at 45, 46.

According to Professor Yoakum, "[t]he only safe procedure is custodial and institutional care *throughout life* for the great majority. . . . Sterilization laws and other means of prevention must for years to come be secondary to this solution of the problem. *Id.* at 66.

The monograph set forth an extensive comparison of the various remedies to the "problem." "Restrictive marriage laws and customs are important, and educative, but fail to reach the irresponsible and degenerate till too late. The 'socially inadequate' are so named just because they are without the influence of law and order. Eugenic education, better environment, and systems of matings purporting to remove defective traits do not affect the impure blood and inheritable factors with the surety necessary to eliminate defects. Laissez-faire or natural selection, euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present-day ideals of religion and humanity." Of all the solutions, "[t]he evidence so far collected points toward *segregation* [emphasis in the original] as the most feasible, most easily put into force, and least subversive of constitutional prerogative." *Id.* at 82.

Yoakum quoted a report prepared by his parent organization to demonstrate the folly of the early approach taken by schools in the East: "A word to the West! . . . New States and communities should equip themselves properly to attack these problems, and should make their

plans on the basis of *complete control*. Had the States of the East followed this method during the last fifty years their burdens would be only a fraction as great as they now are." *Id.* at 17, *quoting* REPORT OF THE COMMITTEE ON PUBLIC SUPERVISION AND ADMINISTRATION TO THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS, SEATTLE, 1913, at 194 (1913). The bulletin concluded by stressing "the necessity for custodial care and oversight for *all* feeble-minded," through the enactment of legislation to "open[] the door of the institution to all feeble-minded of the State. . . ." *Id.* at 80, 83.

The State Conference meeting in San Antonio in November, 1914, presented additional papers. One concluded that "idiots" have "no economic value, and their care can only remain so much of *a dead load upon society*, whether cared for in a home or in an institution. They are, however, less expense in an institution than in the home, poor farm or asylum." Kelley, *The Colony Plan for the Care of the Feeble-Minded*, 2 BULL. TEX. ST. CONF. CHARITIES & CORRECTIONS 57, 48 (1915). Another concluded that "[f]or the actual idiot there is, or should be, no question as to procedure. The disease indicates its own remedy. The next legislature should make an appropriation for a permanent institution, in which these its most unfortunate citizens could be *permanently segregated*." Smith, *The Feeble-Minded Girls in the Virginia K. Johnson Home*, in *id.* at 61, 62.

Four months later, state representatives Ice Berg Reeves and D. S. McMillan had no difficulty convincing the legislature to reenact their H. B. No. 73, "An Act to provide for the establishment and maintenance of a State Farm Colony for the feeble-minded." 1915 Tex. Gen. Laws 143, ch. 90. With Governor Jim Ferguson's signature on the bill on March 22, 1915, Texas provided for "custodial care" for *all* of "the feeble minded of the State" to the end that these unfortunates may be prevented from reproducing their kind *and society relieved of the heavy economic and moral losses arising from the existence at*

large of these unfortunate persons." *Id.* §§ 1, 2. The colony opened on October 31, 1917. Gaver, *supra* at 24.

State officials, led by Superintendent J. W. Bradfield, urged the legislature to make it easier to populate the institution: "The female can, under the faulty labor conditions of today, make a living for a while, but she is, as a rule, quite unmoral, and makes no effort to protect herself. Her children, usually illegitimate, must, as degenerates, criminals, or defectives, eventually become wards of the State. The male moron is also a potential criminal, and is the class from which inmates for our jails and reformatories are recruited. *Their segregation and control, through life, is the remedy.* This can be obtained only by legally committing them to *an institution where they can be kept permanently.*" In order to resolve this "most serious problem," he "urge[d] the enactment of an adequate commitment law." Bradfield, *Report of Superintendent, State Colony for Feebleminded*, in FIRST ANNUAL REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF TEXAS, FISCAL YEAR ENDING AUGUST 31, 1920, at 147 (1921).

The legislature responded favorably, enacting, by a unanimous vote, an act establishing a special "court for the feeble-minded" in each county. 1923 Tex. Gen. Laws 172, ch. 82, § 1. Authority was given to "*[a]ny* person who is a resident of the county having knowledge of a person in his county who appears to be feebleminded" to petition to institutionalize that person. *Id.* § 2. "It shall be sufficient, if the affidavit shall be upon information and belief." *Id.* at 173. A hearing would then be scheduled by the court's issuance of an order "to show cause, if any, why such person should not be declared by said court to be feebleminded. . . ." That order also was deemed to "be sufficient authority to the sheriff or any constable of the county to bring such feebleminded person before the court for such hearing." *Id.* § 3. A jury could be demanded. *Id.* § 1. The finder of fact then "shall investigate

the facts and ascertain whether such alleged feebleminded person is such." *Id.* § 4. "If it be found by the court or jury that the alleged feebleminded person is such, the court shall enter its order so adjudging him, and that he be committed to the custody of the State Coloney [*sic*] for the Feebleminded," *id.* § 5, and "[a]ll persons heretofore or hereafter committed or admitted to such institution shall *remain in its custody as permanent ward of the State* until released by the management thereof," *id.* at 174, § 6.

As a result of the state's encouragement, the "demand for entrance into this institution . . . steadily continue[d] over our accommodations." THIRD REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF TEXAS, COVERING PERIOD FROM SEPTEMBER 1, 1924, TO AUGUST 31, 1926, at 9 (1927). According to Superintendent Bradfield "[t]his period has been marked by considerable growth of the institution, and we feel that we are now much better prepared to be of real service to the State. . . . These additions represent a healthy growth and encourage us in the belief that proper provision for the feeble-minded of the State is now being recognized as an absolute necessity." Bradfield, *Superintendent's Report*, in *id.* at 137, 138. In the same report, the Board of Control reported candidly that "[t]his institution is, of course, purely custodial. . . ." *Id.* at 9.

Virginia. On March 20, 1914, the General Assembly of Virginia enacted a law directing the State Board of Charities and Corrections to "investigat[e] . . . the question of the weak-minded in the State, other than insane and epileptic, and to report to the General Assembly of nineteen hundred and sixteen a comprehensive, practical scheme for the training, *segregation* and the prevention of the procreation of *mental defectives*." 1914 Va. Acts 242, ch. 147, § 1. Under the direction of its chairman, S. C. Hatcher, the Board published in 1915 a 128-page compilation of studies, recommendations, and pro-

posed legislation under the title of THE MENTAL DEFECTIVES IN VIRGINIA: A SPECIAL REPORT OF THE STATE BOARD OF CHARITIES AND CORRECTIONS TO THE GENERAL ASSEMBLY OF NINETEEN SIXTEEN ON WEAK-MINDEDNESS IN THE STATE OF VIRGINIA TOGETHER WITH A PLAN FOR TRAINING, SEGREGATION AND PREVENTION OF THE PROCREATION OF THE FEEBLE-MINDED.

A letter of transmittal from Chairman Hatcher to Governor Henry Carter Stuart accompanying the report stated that "the corrupt fruits of mental *degeneracy in any community* will disappear in proportion to the reduction of feeble-mindedness in that community . . . the *most urgent need* in the work of reducing degeneracy is the elimination of the feeble-minded." *Id.* at 5. Quoting approvingly eugenicist C. B. Davenport, Chairman Hatcher recommended that " '[i]f *the State were to segregate its feeble-minded, were to examine for mental defects all immigrants settling in its borders,* and were to deport those found to be defective, there will be a constantly diminishing attendance at State institutions for the feeble-minded, and at the end of thirty years there would be practically no use for such institutions.' " *Id.*

The official report detailed numerous "case studies" to support its recommendations. For example, one such "feeble-minded" case "with certain facial lines make one feel that he is *not far removed from the brute,* and is perhaps cruel with the unconscious cruelty of *an animal.*" *Id.* at 20. Another case "ha[d] not even the glimmerings of intelligence manifested by some of the lower forms of *animal life.*" *Id.* at 41. Another had a wife who was already committed "in a suitable institution, but it seems a pity that the man, who is lower grade mentally than his wife, though not so much of a menace, cannot be *segregated instead of being allowed to run at large.* A larger and more adequate colony would remedy this." Noting that "the civilized nations of the earth are awakened to the menace of feeble-mindedness, and are taking

steps for the elimination and prevention of this evil, the report stated "that the principal things to be sought are *identification* and *control*, with *the object finally of elimination*; and so we will have to rely largely on *segregation* and education for the prevention of feeble-mindedness." *Id.* at 17. "[T]he main idea is to keep them healthy, happy, and out of mischief. [W]e must take our mental defectives back to the soil to get the best results." The report recommended that "the State should have authority *to segregate and to detain* mentally defective persons under proper conditions and limitations. This is in the nature of *an indeterminate sentence*, and is at the basis of the law which provides that the superintendent of the Virginia Colony for the Feeble-minded shall have authority to hold mentally defective persons *as long as he pleases*, and discharge such persons when he pleases. . . ." *Id.* at 114. In terms of those "at large," the State Board proposed that it "be empowered" to "have charge of the registration of the mentally defective persons of the Commonwealth" and to "have supervision of the care of such persons pending admission to institutions." *Id.* Additionally, "whenever, in the opinion of the said Board and the Division Superintendent of Schools, a child has proven to be a mental defective, the said Board should have authority, in its discretion, to transfer such child to the State School for the Feeble-minded." *Id.* at 117.

The General Assembly responded positively to the report, enacting the following March "An ACT to define feeble-mindedness and to provide for the examination, legal commitment, and *the custody and care of feeble-minded persons, and their segregation* in institutions." 1916 Va. Acts 662, ch. 388.

In 1924, the General Assembly passed "An ACT to provide for the sexual sterilization of inmates of State institutions." 1924 Va. Acts 569, ch. 394. This law, the constitutionality of which was upheld by the Supreme Court in *Buck v. Bell*, 274 U.S. 200 (1927), provided that

"whenever the superintendent" of "the State Colony for Epileptics and Feeble-Minded, shall be of opinion that it is *for the best interests* of the patients *and of society* that *any* inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy." 1924 Va. Acts 569, § 1. The law was enacted, in part, for "the welfare *of society.*" *Id.* (preamble). The law provided for an appeal to a special board, but such appeal was to be dismissed if it be found that the "feeble-minded" resident was "the probable potential parent of *socially inadequate offspring* likewise afflicted" and that "the welfare of the inmate *and of society* will be promoted by such sterilization. . . ." *Id.* at 570, § 2.

West Virginia. In 1917, Governor Henry D. Hatfield first called for the erection of "an institution" which would "provide for the *detention* and care of many feebleminded persons now at large and would assist in solving the problem in this state in preventing the multiplication of such class." *Second Biennial Message of Governor H. D. Hatfield to the Legislature* (1917) in STATE PAPERS AND PUBLIC ADDRESSES OF HENRY D. HATFIELD 77 (n.d.)

"If such an institution should be authorized by the legislature, lands should be purchased to the extent of 500 acres upon which the institution should be erected. This would result in the institution becoming nearly self-supporting because of the fact that practically all of the inmates are able bodied and could perform any ordinary labor under competent supervision." *Id.* at 76-77.

In 1921, the Legislature of West Virginia created for "mental defectives" a state institution to be known as the "West Virginia Training School," for "any person" who "because of mental defect *is a menace to the happiness and welfare* of himself or herself *or of others in the com-*

munity, and therefore requires care, training or control for the protection of himself or herself or of others, and yet who is not insane. This type of persons, commonly classed as feeble-minded, including idiots, imbeciles and morons, shall be known and designated as mental defectives for the purposes of this act. Should the school at any time not be able to accommodate all persons of such class offered for admission, preference in admission shall be given to children and women of child-bearing age." 1921 W. Va. Acts 479-80, ch. 131, §§ 1, 3. "Any relative of a person affected may make application, by complaint under oath, to have the person adjudged a mental defective; *but when the relatives of a mentally defective person either neglect or refuse to place said person* in said school, or in some private institution of a like nature, and shall *permit him or her to go at large*, then *any reputable citizen* of the county may, by complaint under oath, make application to the mental hygiene commission for such commitment. . . ." *Id.* at 480, § 4(a).

The same law empowered the "medical staff" at the institution "to administer such medical treatment and perform such surgical operations for the inmates therein as may be necessary and expedient for the cure and prevention of mental defectiveness or disease." *Id.* at 482, § 5.

Western States

Alaska. Alaska's population was insufficient to justify a separate institution for retarded people in that state. In the territorial days, Congress authorized their commitment temporarily to the detention hospitals at Nome and Fairbanks until they could be transferred permanently to institutions in other states. *See* Pub. L. No. 216, § 7, 35 Stat. 601 (1909); Pub. L. No. 306, ch. 424, § 1, 36 Stat. 352 (1910).

Arizona. On April 20, 1927, the Legislature of Arizona established an institution for "mentally defective

children in the State of Arizona, which shall be known as the Arizona Children's Colony." 1927 Ariz. Sess. Laws 367, ch. 96, § 1. Such "defectives," the law mandated, "if not insane, *shall be held* and be determined to be mentally deficient, and be entitled to enter said colony." *Id.* at 369, § 10. Included among the considerations for determining mental deficiency was that the resident "require supervision, control, care and education, for their own welfare, or for the welfare of others, *or for the welfare of the community.*" *Id.* at 370, § 10(a).

California. On March 9, 1887, California became the first state to provide for the segregation, "for life," of "imbecile or feeble-minded" people. 1887 Cal. Stats. 69, ch. 57. The original funding for the facility, located in Santa Clara, had been authorized two years earlier. 1885 Cal. States. 198, ch. 156.

Because the state promoted segregation, the Santa Clara home grew quickly. By 1889, the institution was admitting not only severely retarded people, but also "cases well calculated to deceive the most observing." SONOMA STATE HOME, THE INSTITUTION BULLETIN (1910). Larger accommodations were soon needed. Therefore, on March 6, 1889, the state legislature appropriated $170,000 to purchase land and "to erect proper and substantial buildings . . . upon said site." 1889 Cal. Stats. 69, ch. 75. The state purchased 1660 acres of land in a remote area near Eldridge in Sonoma County. By 1891 buildings were constructed and on November 24 of that year the residents were moved from Santa Clara. STATE BOARD OF CHARITIES AND CORRECTIONS, FIRST BIENNIAL REPORT 62 (1905).

State officials praised this development, noting that the "special province of the Home for the Feeble-Minded is to deal with the incipient aberration of the mental processes—striking at the cause. . . . This institution would *remove from society* the cause, so far as possible to do so." CALIFORNIA HOME FOR THE FEEBLE-MINDED, SIXTH ANNUAL REPORT 30-31 (1890). Indeed, there was

a felt need to track down the "very large class of those unfortunates for whom no application for admission into this institution has been made." *Id.* at 29.

On March 31, 1897, a law was passed amending the 1885 statute that had restricted admissions to those "feeble-minded children between the ages of 5 and 18 years . . . who are incapable of receiving instruction in the common schools." 1885 Cal. Stats. 198, ch. 156, § 8. Under the new law, the institution was "direct[ed] to admit" not only "idiots" but also "epileptics and mentally enfeebled paralytics . . . *irrespective of age*, as the accommodations of the home may permit, and as may, in the judgment of the management, appear suitable subjects for such admission." 1897 Cal. Stats. 251, ch. 188.

In its *First Biennial Report*, the newly created State Board of Charities and Corrections stated: "There are several reasons why the feeble-minded should be cared for in Homes of this sort. Their presence in the community at large is apt to be very detrimental to normal children, and when they come to the adolescent age the danger of reproduction in kind is very great and should, if possible, be prevented." FIRST BIENNIAL REPORT, *supra* at 41.

By the time of its Third Biennial Report, the State Board was stating unequivocally that there were "now in county hospitals, in orphan asylums, and other institutions, and *even in homes*, children who could be much better cared for in the State Home for the Feeble-Minded. Such a child is generally a *menace to the institution, the family, or the community in which he is*. It is desirable in every way to accept into the Home these children, as to *keep those who are now there*." STATE BOARD OF CHARITIES AND CORRECTIONS, THIRD BIENNIAL REPORT 73 (1908).

In 1909, the California legislature became the second in the nation to vote into law "an act to permit asexualization of inmates of . . . the California Home." 1909 Cal. Stats. ch. 720.

This law was progressively extended to cover more individuals by amendments of 1913 and 1917. The 1913 measure specified that sterilization could be performed "with or without the consent of the patient." 1913 Cal. Stats. ch. 363. The 1917 act extended the procedure to all persons deemed to suffer from "marked departures from normal mentality." 1917 Cal. Stats. ch. 489.

State officials also kept constant pressure on the legislature to provide increased appropriations to segregate more and more retarded persons, linking retardation with the immigration of "defectives." In 1915, an act was passed authorizing a legislative committee to investigate the necessity for a second mental retardation institution in the state. 1915 Cal. Stats. 1139, ch. 729. That committee found: "So fundamental is this problem of the feeble-minded that one can assert without fear of successful contradiction that if all the time, money and effort now devoted to the solution of all of our social problems were concentrated for the next ten years on the question of feeble-mindedness, there is not a social problem that would not be nearer its solution at the end of ten years than it will be under the present plan. The first step is to provide state colonies." LEGISLATIVE COMMITTEE ON MENTAL DEFICIENCY, REPORT ON MENTAL DEFICIENCY 22 (1917). The Committee further found, "[i]n considering the advantages of creating such an institution for the proper care of the mentally defective as unfortunate individuals, there is also to be remembered the benefit to society of thus being relieved of the menace of their unsocial conduct." *Id.* at 65. The Committee also recommended legislation "creating a new institution for feeble-minded and epileptic persons, to be located in Southern California." *Id.* at 63.

In the meantime, the State Board commissioned a series of "surveys in mental deviation" to bolster its case for another institution. Based upon the surveys it had commissioned, the Board reported a firm "*relation between race and mental deficiency.*" STATE BOARD OF

CHARITIES AND CORRECTIONS, EIGHTH BIENNIAL REPORT 51 (1918). One of the surveys, focusing upon the Merced County public schools, found that 4.24% of the students were "feebleminded." CALIFORNIA BOARD OF CHARITIES AND CORRECTIONS, REPORT OF THE STATE JOINT COMMITTEE ON DEFECTIVES IN CALIFORNIA 27 (1918). This high number was explained by the fact that the county surveyed "possess[ed] *an exceptionally high proportion of foreign-born* in its population." *Id.* Since "of those found feeble-minded, 75.7% had foreign born parents," it was "evident, therefore, that *most of the feeblemindedness in this country is due to the immigration of undesirable types.*" *Id.* at 35. Referring specifically to greater retardation it found among Mexicans and Portuguese, the report expressed "no wonder that these nationalities are present in the reform schools and state prisons in far greater proportions than their numbers in the state would seem to warrant." *Id.* at 35-36.

The survey found "the *ratio of feeble-mindedness was far higher among Mexicans, Negroes, and recent immigrants from Europe than among those of native American stock,*" and concluded that "*California has drawn a large proportion of immigrants of an undesirable type.*" *Id.* at 13-14, 19.

Referring to the survey of the Merced schools, the report found that the "hopelessly feeble-minded should be removed from the public schools and placed under *permanent custodial care.*" *Id.* at 45.

The report "estimated the annual cost of feeble-mindedness in the State of California at $5,000,000" including "relief for indigent and dependent defectives, expenditures for court proceedings and probation work for feeble-minded delinquents, depredations committed by defective delinquents, expense to the state of feeble-minded individuals in the prisons . . . and finally the money which is worse than wasted in the futile attempt to educate feeble-minded children. . . . We have not included in these estimates the losses accruing from

vocational unfitness, alcoholism, venereal disease, and prostitution among the defective population. It would not be surprising if these losses, although less tangible and altogether impossible to estimate accurately, were as great as all the other losses combined." *Id.* at 42.

The report noted the state's "awakening to the menace of the feeble-minded" as one of the most noteworthy movements of present public thought," *id.* at 5, and concluded that "[a]ll of the findings of this study emphasize the *necessity of bringing a larger proportion of our defectives under social surveillance and restraint*," *id.* at 19. Lamenting the fact that "California has but one state institution for the care of the feeble-minded," and arguing for the "*permanent segregation* of all feeble-minded individuals" and to "extinguish the defective strains which now encumber our prisons, reform schools, jails, courts, and public schools," the report urged as the "first step in this direction" the appropriation of funds for "the establishment of an additional state home for the feeble-minded." *Id.* at 51, 43.

The legislature in 1919 appropriated $100,000, 1919 Cal. Stats. 1214, ch. 562, and, in 1921, $120,000, 1921 Cal. Stats. ch. 445, for the construction of buildings at the "Pacific Colony." The facility opened on March 20, 1921. FIRST BIENNIAL REPORT OF THE DEPARTMENT OF INSTITUTIONS OF THE STATE OF CALIFORNIA 68 (1922).

In 1915, the legislature amended the law permitting the institutionalization of any "imbecile or feeble-minded person or any idiot" to the Sonoma State Home. The amendment added a proviso that, in addition to a parent or guardian, "any peace officer may petition said court for an order admitting such a person to such hospital." 1915 Cal. Stats. 1262, ch. 638.

State officials stated that the new law would "make it possible to secure the commitment of children who need institutional care but *whose parents or guardians are averse to such action*." STATE BOARD OF CHARITIES AND CORRECTIONS, BIENNIAL REPORT 30 (1916).

Colorado. On May 5, 1909, the General Assembly of Colorado established that state's institution "for mental defectives." 1909 Colo. Sess. Laws 180, ch. 71. The institution was opened on July 1, 1912, and its purpose from the outset was the "*segregation*, in an institution, for life," of the "defectives." FIRST BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1911-1912, at 5 (1912).

The program instituted by Colorado officials to enforce the state's new law was summarized in its *Second Biennial Report:* "The law of Colorado requires the legal commitment of all inmates to the State Home and Training School for Mental Defectives. This gives the management the control regarding the question of removal or discharge, and, in a limited sense, enables the institution *to prevent this class of persons from coming in contact with the populace*. It is impossible to restore feeble-minded persons to a normal condition, and by reason of this fact *they should be kept in an institution indefinitely*, and not be permitted to marry and perpetuate their kind. In years gone by, institutions for this class of persons took some pride in graduating as many as possible, and would turn them *loose in the world* to multiply; but this error is being corrected, as far as possible, by *holding them indefinitely* in institutions provided for their care and training." SECOND BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1913-1914, at 4-5 (1914).

By then, a peonage system had been established: "Many of the boys work on the farm and in the garden, in the laundry and in the kitchen. Girls and boys alike assist in making beds, sweeping, scrubbing floors, washing dishes, setting tables, and doing all kinds of housework. Some are capable of driving teams and can handle the hay-stacker quite skillfully. As the institution grows older, and more buildings are provided, and the popula-

tion increases, there will be enough boys who will become skilled by teaching and training to make the institution in a measure self-supporting." SECOND BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1913-1914, at 5 (1914).

Hawaii. On April 19, 1919, the Legislature of the Territory of Hawaii passed "AN ACT Providing for the Establishment and Maintenance of a Home for Feeble-Minded Persons." 1919 Haw. Sess. Laws 137, Act 102. The law specified custody, "said home [to be] conducted on the 'farm colony' plan." *Id.* § 2.The Home was open to all Hawaiians requiring institutionalization "for their own welfare, for the welfare of others, *or for the welfare of the community.*" *Id.* at 138, § 4.

The institution was "considered merely a place to get the feeble-minded out of the community. . . ." DEPARTMENT OF INSTITUTIONS, TERRITORY OF HAWAII, THE FIRST TEN YEARS, 1939 THROUGH 1949, at 37 (1949).

Idaho. The "Idaho State Sanitarium" for "the feeble-minded" was established in 1911 by enactment of the Legislature of Idaho. 1911 Idaho Sess. Laws 86, ch. 41. Upon a finding that a person was "feeble-minded," according to the state, a judge "must issue and deliver to some peace officer for service a warrant directing that such person be arrested and taken before any Judge of a Court of record within the county for examination." *Id.* at 94, § 33.

In 1921, it was explicitly mandated that the institution be used for confinement of those "mentally defective from birth and not insane, *irrespective of age,* who are legal residents of the state, and *who are from a social standpoint dangerous to be at large and a menace to society.*" 1921 Idaho Sess. Laws 326, ch. 139, § 1.

To assist in the elimination of this "menace," the legislature adopted "AN ACT TO CREATE A STATE BOARD OF EUGENICS; TO PROVIDE FOR THE

STERILIZATION OF ALL FEEBLE-MINDED . . . WHO ARE A MENACE TO SOCIETY." 1925 Idaho Sess. Laws 358, ch. 194. The law "declared the duty" of the superintendent of the Idaho State Sanitarium to register with the new Board of Eugenics "all persons, male or female, who are feebleminded . . . who are, or in their opinion are likely to become, a menace to society." *Id.* at 359, § 2."[I]f in the judgment of a majority of said Board procreation by such person would produce a child or children having an inherited tendency to feeble-mindedness . . . or who would probably become a social menace or ward of the State, and there is no probability that the condition of such person so investigated and examined will improve to such an extent as to avoid such consequences, then it shall be the duty of such Board to make an order embodying its conclusions with reference to such a person in said respects and specifying such a type of sterilization as may be deemed by said Board best suited to the condition of said person and most likely to produce the beneficial results in the respects specified in this section." *Id.* One of the "objects to be sought" by this chapter was "to protect society from the acts of such person, or from the menace of procreation by such person." *Id.*

Montana. On March 4, 1919, the Legislative Assembly of Montana passed "An Act Relating to the Admission, Care and Retention of Feeble-Minded Persons."1919 Mont. Laws 196, ch. 102. The law established the "Montana Training School for Feeble-Minded Persons" for the *"detention"* of "feeble-minded minors and adults." *Id.* § 1. The law also provided that *"no inmate may be removed from said institution, permanently or temporarily,* except upon a written order of the superintendent or upon an order of any District Court of the state and the provisions of this Section shall apply to adults as well as to the minors therein. The costs of such court action to be borne by the party bringing the action." *Id.* at 198, § 9.

Four years later, the lawmakers authorized surgery that would "surely and permanently nullify the power to procreate offspring, to achieve permanent sexual sterility" of the "feebleminded," 1923 Mont. Laws 535, ch. 164, § 2(e), with the purpose of "protect[ing] society from the menace of procreation by said inmate," *id.* at 537, § 8.

Nevada. Nevada, like Alaska, did not have sufficient population to support its own institution. For this reason, the legislature authorized state officials "to make arrangements with the director of any institution for the feeble-minded in California, or Utah, or other states" for Nevada's "feeble-minded." 1913 Nev. Stats. 576, ch. 287.

New Mexico. On March 20, 1925, the Legislature of New Mexico mandated that "[t]here shall be established and hereafter maintained by this State an institution to be known as The Home and Training School for Mental Defectives," for "any person mentally underdeveloped or *faultily* developed" who "requires supervision, care and control for his own welfare, or for the welfare of others, *or for the welfare of the community,* and which mentally defective person is not classified as an insane person." 1925 N.M. Laws 254, ch. 133, §§ 1, 2. Commitment proceedings could be initiated by "[a]ny person over the age of twenty-one years" by alleging "the facts bringing each person within the provisions of this Act and shall state the name and place of residence of such person. . . ." *Id.* at 255, § 5. "The superintendent, with the approval of the Board, may give preference to cases which constitute a *special social menace.*" *Id.*

Oregon. Before authorizing the establishment of a segregative institution, the Oregon Legislative Assembly ordered a formal study. The report that issued indicated that the reason "for custody of feeble-minded" that "outweigh[ed] all others in importance to the State" was that the "*effect of the mingling of the feeble-minded with society* is a *most baneful evil.*" REPORT OF THE BOARD OF BUILDING COMMISSIONERS OF THE STATE OF OREGON

RELATIVE TO THE LOCATION AND ESTABLISHMENT OF AN INSTITUTION FOR FEEBLE-MINDED AND EPILEPTIC PERSONS, TO THE TWENTY-FOURTH LEGISLATIVE ASSEMBLY, REGULAR SESSION, 1970, at 22, 23 (1906). "Once admitted, they remain at the institution *for life*." *Id.* at 37. The Legislative Assembly followed the recommendation of the report when, on February 23, 1907, it passed "AN ACT Creating the State Institution for Feeble-Minded," for the "care and custody of feeble-minded, idiotic, and epileptic persons." 1907 Or. Laws 145, ch. 83, § 1. The facility was for "all idiotic and epileptic persons" residing in the state for at least a year. *Id.* at 146, § 8.

In 1917, the Legislative Assembly enacted a more sweeping law: "The county judge of any county of this State *shall, upon the application of any citizen* in writing, setting forth that *any person* over five years of age *is feeble-minded or* who, by reason of feeble mindedness, is criminally inclined, or is unsafe to be at large, or may procreate children, *cause such person to be brought before him* at such time and place as he may direct . . . Such judge, if in his opinion said person is feebleminded, shall commit said person to the Institution for the Feebleminded of the state of Oregon for *indeterminate detention*. . . ." 1917 Or. Laws 739, ch. 354, § 1. The same law required that "[a]ll county superintendents of schools shall make reports on the first of June and the first of December of each year to the county courts of their respective counties which report shall contain the names and addresses of all scholars in the public schools and of *all children* of school age in their respective counties who are mentally defective. . . ." *Id.* at 740, § 5.

Soon thereafter, the lawmakers installed a "state board of eugenics," and "declared the duty" of "the superintendent of the state institution for feeble-minded" to "report," on a quarterly basis to the board "all persons, male or female, who are feeble-minded" that "are, or in his opinion are likely to become, a menace to society." 1923 Or. Laws 280, ch. 194, §§ 1, 2. The board's "duty"

was to review the superintendent's opinion and, if in agreement, order sterilization. *Id.* at 280-81, § 3. If the resident failed to consent to the surgery, "such operation shall thereupon be performed upon said person by or under the direction of the superintendent of the institution." *Id.* § 6.

Utah. The "Utah State Training School for Feeble-minded" was established in 1929 for "*all* feeble-minded persons who are residents of the State, whose defects prevent them from properly taking care of themselves *or who are a social menace.*" 1929 Utah Laws 102, 108, ch. 75, § 22.

Commitment proceedings could be initiated by "any person" by alleging that someone in the community "by reason of feeble-mindedness is *a social menace.*" *Id.* at 110, § 23(3). "Upon receipt of such application, duly signed and acknowledged, the clerk of the district court shall present the same at the earliest date, and the judge of the district court shall issue a warrant to the sheriff of the county to produce the person described in such application before the court forthwith for examination." *Id.* at 112. If the court "believes" that such person is, "by reason of feeble-mindedness, a social menace" then it "must make an order that such person be confined in the Utah State Training School." *Id.* at 113, § 29.

The same legislation required that "*any patient*" at the institution "should be sexually sterilized" by "the operation of sterilization or *asexualization.*" Such surgery was to be performed "[w]henever the Superintendent and board of trustees of the Utah State Training School shall be of the opinion that it is for the best interests of the patients *and of society.*" *Id.* at 115, § 31.

The state institution was soon filled to capacity. By 1938, the Board of Trustees was able to report to the legislature and the Governor that "[t]he physical growth of the Utah State Training School and the scope of its service to the State of Utah must be recognized as having removed all possible doubt or question as to the *funda-*

mental necessity of maintaining such an institution as a part of the broad program of education *and social regulation and control.*" FOURTH BIENNIAL REPORT OF THE BOARD OF TRUSTEES OF THE UTAH STATE TRAINING SCHOOL, AMERICAN FORK, UTAH, TO THE GOVERNOR AND LEGISLATURE FOR THE BIENNIUM ENDING JUNE 30, 1938, at 3 (1938). "The many actual experiences of the board since the school was established has demonstrated that *the presence of a feebleminded child in a home* is more depressing, expensive and tragic than any known disease. Mental defect vitiates the offspring, and *wounds our citizenry a thousand times more than any plague man is heir to.* Even though this grief is often veiled with a smile, it destroys, demoralizes and sets as naught the lives of too many of our people. The Board of Trustees has considered the so-called South Dakota plan by which responsibility is divided among the different community organizations and state agencies, but all with *the ultimate purpose of segregating, supervising, and then sterilizing* certain of the mentally deficient within the state." *Id.* A major outreach effort was undertaken with the support of the state agency: "Under the welfare program as now operating, community welfare workers are cooperating with the schools in the various communities and in this way many of the mentally deficient *who have heretofore been overlooked and held as problems to their families and immediate neighbors only, are now detected* and the necessity recognized for some action to prevent their continuing as a menace. . . . *When once they are detected and their status is known, proper protection to society requires that they be segregated and supervised, at least until they are sterilized.*" *Id.* at 5.

Washington. In 1905, the Legislature of the state of Washington adopted as an emergency measure "AN ACT providing for the care of defective and feeble minded youth, establishing an institution therefor." 1905 Wash. Laws 133, ch. 70. The law made it "the duty of the clerks of all school districts in the State of Washington at the

time of making the annual reports, to report to the school superintendent of their respective counties the names of all feeble-minded youth residing within their respective districts." *Id.* at 135, § 7. The school superintendents, in turn, were required to annually "report to the State Board of Control" those names. *Id.* at 134, § 4.

The law stated, flatly: "It shall be *the duty* of the parents or guardians of such defective youth to send them to the said institution for feeble-minded." *Id.* at 135, § 9. Moreover, the legislature made it *a crime* for the parents to fail to follow this "duty": upon their failure to send their child to the state institution, the parents "shall *be deemed guilty of a misdemeanor*, and upon conviction thereof, upon the complaint of any officer or citizen of the county or state, before any justice of the peace or superior court, *shall be fined in any sum not less than fifty nor more than two hundred dollars* in the discretion of the court." *Id.*

A 1909 amendment to the law provided that "children who are idiotic, epileptic or afflicted in any particular that renders them *unfitted for companionship with other children shall be segregated. . . .*" 1909 Wash. Laws 260, tit. I., subch. 6, § 2.

In 1913, the legislature changed the name of the state institution to the "State School and Colony," and provided that commitment proceedings could be initiated, without the consent of the parents, by the superintendent of the institution and by county superintendents of schools, and by county commissioners. 1913 Wash. Laws 598, ch. 173, §§ 1, 2. The law provided that "[c]ounty superintendents of schools shall cause to be filled out the prescribed blank applications for admission for such children in their respective districts, who by reason of mental or physical defects are incapable of receiving instruction in the common schools of this state, *or whose habits are such as to render them unfit for companionship with normal children.*" *Id.* at 598-99, § 4. The law also eliminated a restriction in the prior law limiting admissions to

those under twenty-one years of age. *Id.* at 599-600, §§ 8, 9. In accord with the real purpose of the facility, the name was changed once again, this time to "The State Custodial School." 1917 Wash. Laws 224-25, ch. 64.

In 1921, the lawmakers passed "AN ACT to prevent the procreation of feeble minded," which "declared the duty" of the superintendent of the state institution" to report to the Board of Health "all feeble minded . . . who are persons potential to producing offspring who, because of inheritance of inferior *or anti-social traits, would probably become a social menace* or wards of the State." 1921 Wash. Laws 162, ch. 53, § 1. The Board was given "the duty," following an investigation and a hearing, to "make an order directing the superintendent of the institution in which such inmate is confined to perform or cause to be performed upon such inmate such a type of sterilization as may be deemed best by said Board," with the only proviso being that "no person shall be emasculated under the authority of this act except that such operation shall be found to be necessary to improve the physical, mental, neural or psychic condition of the inmate." *Id.* at 163-64, §§ 2, 3.

Wyoming. On February 18, 1907 the Legislature of Wyoming "established in this state an institution for the *custody,* care, education, proper treatment *and discipline* of feeble-minded and epilpetic persons, under the name and style of the "Wyoming Home of the Feeble-Minded and Epileptic." 1907 Wyo. Sess. Laws 188-89, ch. 104, § 1. The institution was created for "*[a]ll* feeble-minded and epileptic persons over the age of six years, who are legal residents of the State of Wyoming." *Id.* at 190, § 9.

Four years later, the name was changed to the "Wyoming School for Defectives," 1911 Wyo. Sess. Laws 166-67, ch. 103, § 1, and an involuntary commitment procedure was established, *id.*

In 1929, the legislature expanded the law to permit the initiation of commitment proceedings by the "pros-

ecuting attorney of the county in which hearing under this Act is proposed to be held, or by *any* citizen of Wyoming," 1929 Wyo. Sess. Laws 156, ch. 95, § 16, and the person to be committed was given the right to demand a jury trial, *id.* at 158, § 20.

District of Columbia

The segregation of retarded people in the District was encouraged and required by the executive and legislative branches of the United States in those days preceding District home rule. The earliest involvement of the United States occurred when, in the nineteenth century, "certain feeble-minded children were taken in charge from time to time by the Secretary of the Interior" and sent to the Pennsylvania Training School at Elwyn. CHARITABLE AND REFORMATORY INSTITUTIONS IN THE DISTRICT OF COLUMBIA: HISTORY AND DEVELOPMENT OF THE PUBLIC CHARITABLE AND REFORMATORY INSTITUTIONS AND AGENCIES IN THE DISTRICT OF COLUMBIA, S. DOC. NO. 207, 69th Cong., 2d sess. 326 (1927).

At the turn of the century the prevailing public sentiment had become one of intolerance. The District Board of Charities in its 1902 Annual Report first called for the establishment of an institution for the District. "Many of the class of children referred to remain children permanently, regardless of their age, and it is important that they should be under custodial care, because of the great menace to the community involved. . . . " S. DOC. NO. 207, *supra* at 327. In 1907, the Board of Charities again stated that it could "not too strongly emphasize the importance of the *permanent segregation* of this class." *Id.* at 328. By 1913, the language of the Board's recommendation had become more urgent yet: "While institutions for the care of the feeble minded are usually designated as 'schools,' it must not be forgotten that many of this class *should be segregated* and under supervision *during their entire lives*, and most of them should *never be al-*

lowed at large. . . . We recommend, therefore, that steps be taken as soon as possible looking to the acquirement of a tract of land and the establishment thereon of a suitable institution for the care and training of the feeble-minded and the *permanent segregation* therein of such of them as are *unfit to be at large in the community.*" *Id.* at 329-30. The Monday Evening Club formed a committee to pursuade Congress of the need for "[s]egregation of the adult feeble-minded." *Urges Institution for Feeble-Minded*, Wash. Star, Nov. 18, 1913, at 9.

The United States Department of Labor, through its Bureau of Children's Services, undertook a comprehensive "study of the extent of the problem of mental defectiveness in the District of Columbia," as the Department explained in the introduction to its report, "at the request of a citizen committee . . . organized under the leadership of the Monday Evening Club, [and] composed of representatives of various philanthropic and social agencies and institutions of the District whose dealings with the problems of the community have made them realize the urgent need for securing an institution for the proper care and treatment of mental defectives." U.S. DEPARTMENT OF LABOR, MENTAL DEFECTIVES IN THE DISTRICT OF COLUMBIA: A BRIEF DESCRIPTION OF LOCAL CONDITIONS AND THE NEED FOR CUSTODIAL CARE AND TRAINING 7 (G.P.O. 1915). Federal employees at the Department gathered data regarding "the danger to the *whole community* resulting from the lack of proper provision for those suffering from mental defect." *Id.* at 8.

Under a chapter entitled "reasons for segregation," the Department of Labor listed a number of considerations it thought important. For example, "[a] mentally defective child in a family demands a large share of the energy of the mother and not only interferes with the training of the other children but exercises *a demoralizing influence on the family life.*" *Id.* at 20. The "mentally defective" were also a "danger to society": "The number of mental defectives among recidivists empha-

sizes the need of discovering mental defect early in the careers of delinquents and *segregating them permanently* for their own welfare *and for the protection of society. . . .*" *Id.* at 21. Only "[b]y means of *segregating mental defectives* it is possible to cut off at the source a large proportion of degeneracy, pauperism, and crime." *Id.* Indeed, the Department of Labor expressed concern that "[m]any children . . . now in the schools constitute a menace to the other pupils." *Id.* at 18. Thus, according to the federal agency, "[i]nstead of being regarded as an individual misfortune, mental defect has come to be recognized as a destructive social force." *Id.* at 20.

The Department of Labor acknowledged that the establishment of the institution for the District of Columbia would create its own demand: "[T]he number of inmates will increase as the institution becomes better established and as the public becomes familiar with its purposes and the value of its work to those cared for *and to society.* It has been said that the presence in a community of any specified type of defectives becomes apparent only when accommodations are provided for the care of this particular class. Without question this will be found to be the situation in the case of mental defectives." *Id.* at 19. But it would be "out of the question to provide separate institutions for the different types of mental defectives." *Id.* at 24. Referring to the "*various grades*" of "idiot," "imbecile," and "moron," *id.* at 8, 24, the Department recommended that the facility "be large enough to provide the necessary room for *all these classes*, allowing for proper separation of white and colored, male and female," *id.* at 24. The report of the United States Department of Labor concluded by quoting approvingly from an editorial in *Survey* magazine (March 2, 1912): "The greatest need of all is for *more institutional care.* When this has been brought about *in every State* we shall witness a great gaol delivery. . . . Biology and economics unite in

demanding that the strains of *feeble-mindedness shall be eliminated* by the humane *segregation of the mentally defective.*" *Id.* at 28.

The Congress responded to the Department of Labor's strong recommendations, when it "authorized and directed" the District Commissioners "to use a site for a home and school for feeble-minded persons, said site to be located in the District of Columbia. . . ." P.L. No. 67-256, 42 Stat. 39 (1922). The Board of Charities, while generally pleased that Congress had acted, noted that the proviso that the institution be located within the District was "a fatal error" in the enactment. REPORT OF THE BOARD OF CHARITIES OF THE DISTRICT OF COLUMBIA 9 (1922). According to the Board, it would be far better to locate the institution "away from thickly settled communities" since "[f]or these unfortunates, children in mind but many of them old in years, all that society can do is to provide humane and sympathetic care *apart from the excitement and complexities of modern life.*" *Id.* at 10.

In 1923, the Executive Secretary of the Board of Charities, George S. Wilson, accompanied by five other members of the Board, appeared before the Senate Committee on the District of Columbia to express their concern over the specified location of the institution. Wilson testified that "there is a unanimity of opinion on the part of the people of the District of Columbia on this item, greater than we have ever seen exhibited in regard to any matter of great public interest. It is not only the medical and social, and the general welfare organizations, but it is the civic associations and the Board of Trade and other organs of public opinion. At this moment the Board of Trade is circulating among its members a petition, and the Monday Evening club and other bodies are circulating similar petitions, and we are all very much concerned about it." *District of Columbia Appropriations Bill, Hearings Before the Comm. on Appropriations*, 67th Cong., 2d sess. 94-98, 183-84 (Jan. 13, 15, 1923).

In response to questioning by the Senators, Wilson explained further "the difficulties that they have in all these other States. I have just come from a visit to the Michigan school. They have the low-grade idiot, *which the Senator knows is not much above the animal.* They have the imbeciles; *that term is almost self-explanatory.* They have the higher grade, the dangerous cases, the morons, *the fellows that set fire to buildings, and the women who have illegitimate children.* There are at least three classes that no persons having humane instincts would classify together. Those three, multiplied by two to separate the sexes, make six; and then we have to multiply by two to provide for the separate colors here, which makes a minimum of 12 groups of these dependent people that we must provide for—helpless and dependent—and above everything else *unable to associate safely with normal people. Isolation is demanded, absolutely,* and the only thing we can promise to put into their lives is humane *segregation in the open air." Id.* at 96. Wilson concluded his testimony by emphasizing that it was "the segregation from society that is the best of things." *Id.* at 183. Senator Ball commented, *"[i]f you are going to segregate that class* of people to make them more content, you want a farm *entirely separate."*

The following year, the Congress "authorized and directed" the District Commissioners "to acquire a site for a home and school for feeble-minded persons, said site to be located in the District of Columbia *or in the State of Maryland or in the State of Virginia,* and to erect thereon suitable buildings at a total cost not exceeding $300,000. . . ." P.L. No. 67-457, 42 Stat. 37 (1923).

On March 3, 1925, the Congress enacted "An Act to provide for commitments to, maintenance in, and discharges from the District Training School. . . ." P.L. No. 69-578, 43 Stat. 1135 (1925). The law defined "feeble-minded persons" to include "any person afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of managing himself and

his affairs, or being taught to do so, and who requires supervision, control, and care for his own welfare, or for the welfare of others, or *for the welfare of the community*, and is not insane or of unsound mind. . . ." *Id.* § 2. Congress gave "*any reputable citizen* of the District of Columbia" the authority to initiate commitment proceedings, *id.* § 7, and "if it shall be made to appear to the court by evidence given under oath that it is for the best interest of the alleged feeble-minded person *or of other persons or of the community that such person be at once taken into custody* . . . *id.* § 10, 43 Stat. at 1136.

A week later, on March 10, 1925, the institution, located at Annapolis Junction, "midway between Baltimore and Washington" began operation when "10 boys were received," housed in a "temporary building." REPORT OF THE BOARD OF CHARITIES OF THE DISTRICT OF COLUMBIA 2 (1925). They were immediately put to work: "The boys thus far have been engaged in clearing and grading for the location of buildings, repairing roads, digging trenches, etc., and in general farm work. A good garden was started in time to supply vegetables in abundance during the summer. An encouraging beginning has been made in actual farm work; 60 acres of corn were planted and a good yield will furnish sufficient grain and forage for the stock, chickens, hogs, etc., during the coming winter. Enough potatoes have been raised also to meet the institution needs until next spring." *Id.*

APPENDIX B

TEXTS OF THE 1947 ZONING ORDINANCE OF THE CITY OF CLEBURNE AND THE 1929 ZONING ORDINANCE OF THE CITY OF DALLAS

The Ordinance of the City of Cleburne passed and approved the 26th day of September, 1947 provided:

"Sec. 5. Second Residential District. In a second residential district no building or premises shall be used, and no building shall be erected or structurally altered which is arranged or designed to be used for other than one or more of the following uses:

Any use permitted in First Residential District,

Advertising signs or symbols,

Tourist courts, ice delivery stations,

Battery shop, furniture store, meat market, hardware store,

Ladies and Mens Ready to Wear Store, lumber yard and building supplies,

Florist shop, antique shop, barber shop, beauty shop,

Contractors office, Carpenter shop, electric shop, carpet cleaning shop,

Fruit stand, grocery store, filling station with washing and greasing,

Mattress renovating, furniture repair, plumbing shop, drug stores,

Picture show, private club, sign shop, cleaning and pressing shop,

Hand laundry with not over 5 employees, washateria, cafe or drive-in,

Melon garden, playground or recreational park,

Funeral home, *hospital or clinic, other than* [for] *tubercular, liquor, narcotic, insane, or feeble minded patients,*

Educational or philanthropic institutions, other than correctional or penal,

No installation or business will be permitted that cause smoke, dust, fumes, odors, gasses, noises, vibrations, or electric disturbances or static,

No power over 10 h.p. may be used or installed."

The Ordinance of the City of Dallas, No. 2052, passed September 11, 1929 provided:

"*SECTION 4. APARTMENT DISTRICT.* In an apartment district no building or premises shall be used, and no building shall be erected or structurally altered which is arranged or designed to be used, for other than one or more of the following uses:

(1) A use permitted in a dwelling district.

(2) Apartment house. Hotel. Boarding or lodging house.

(3) *Hospital or clinic other than for tubercular, liquor, narcotic, insane, or feeble-minded patients.*

(4) Institution of an educational or philanthropic nature, other than a penal or correctional institution.

(5) Private garage as an accessory use when located not less than 60 feet back from the front lot line and not less than 20 feet back from any other street line, or located in a compartment as an integral part of the main building.

(6) Accessory buildings and uses customarily incident to any of the above uses when located on the same lot and not involving the conduct of a business."

APPENDIX C

STATEMENTS OF AMICI SELF-ADVOCACY ORGANIZATIONS ON DISCRIMINATORY ZONING LEGISLATION

STATEMENT OF UNITED TOGETHER

United Together, a nationwide network of disabled self-advocates, believes the Cleburne City law which prohibits "homes for . . . the feebleminded . . ." is unreasonable and unjust. Though the term "feebleminded" is old fashioned, the law performs the same job now as it did when written. The purpose of the law was and is to enforce a local bias: "We don't know anything about 'those people' so we don't want them in our neighborhood."

America was conceived on the principle that individuals have a right to aspire and to be all they can be. Some people need more help than others in reaching their potential, help from family and friends. No law or label — which is what an I.Q. score is — can predict what a person can achieve.

Since under ordinary circumstances Americans have a right to live wherever they want to as long as they can pay for it, these zoning laws perform only one job: to take ordinary rights from people the lawmakers know nothing about except that they have been given a certain label.

Social behavior is influenced by family values, environment, and affection. Educators and psychologists do not claim that I.Q. scores — which are the litmus tests for whether or not someone is labeled retarded — can be used to predict social behavior. The only thing I.Q. tests are supposed to measure is intelligence, and there is a great deal of controversy over how well they do that.

United Together believes that discriminatory zoning laws help no one.

STATEMENT BY PEOPLE FIRST OF NEBRASKA

People First of Nebraska is a statewide group composed of persons who have a developmental disability (most of the members have mental retardation). The group was formed in 1978 and represents the approximately 48,000 persons in Nebraska who have developmental disabilities. Membership is open to all persons who historically have not had the opportunity to speak out for themselves.

People First of Nebraska has as one of its major purposes the education of its members on how to speak for themselves since for so long people spoke for us for many years. One of the ways we can speak for ourselves is to decide on issues concerning us, such as where we want to live, where we want to work, or have the same freedoms that other people have. We should be looked upon as people first and decisions should not be made because of our disabilities alone.

There would be a big difference in people's lives if they would be able to live and work where they wanted to. We feel very strongly that persons with mental retardation should not be discriminated against.

STATEMENT OF PEOPLE FIRST OF WASHINGTON

People First of Washington *strongly* believes that all people with developmental disabilities have the right to live in neighborhoods in the community in the same way as any other citizen. People First believes that the zoning laws of the city of Cleburne, Texas, are discriminatory and illegal under the Constitution of the United States of America.

People First of Washington does not believe that just because a person has a developmental disability, they should have to obtain a "special zoning permit" to live in the neighborhood and community of their choice.

Here in Washington State, there are dozens of group homes and other residential programs for people with developmental disabilities. There is no evidence whatsoever, that people with developmental disabilities affect the quality of life in any neighborhood or should be required to obtain special permits to live in the same way as any other citizen. In fact, we would like to suggest that people with developmental disabilities living in the community improves a neighborhood.

In Washington State, there has been a successful "deinstitutionalization" of people with development disabilities to community living programs similar to the Cleburne Living Center Program, which are highly successful and improve the quality of life for all citizens.

Any law which discriminates against citizens with developmental disabilities must be challenged. The Cleburne zoning law which describes people as "feebleminded" and requires special zoning permits, is illegal, discriminatory, unconstitutional, and must be challenged.

STATEMENT OF THE CONSUMER ADVISORY BOARD OF THE MASSACHUSETTS ASSOCIATION FOR RETARDED CITIZENS

The members of the CAB believe that everyone has the right to live in the community and to enjoy the rights, privileges and responsibilities of full citizenship. The CAB members believe that discrimination based upon the label of mental retardation is wrong and should be declared unconstitutional.

Many CAB members had previously lived in large state institutions that denied them human dignity and control over their own lives. CAB members have become good neighbors and productive citizens since moving into group homes and apartments in the community.

The Consumer Advisory Board continues to work to guarantee the civil rights of people with disabilities. We consider the right to live in the community an essential part of our civil rights.

STATEMENT OF WISCONSIN ADVOCATES

We, the Wisconsin Advocates, a division of the Association for Retarded Citizens in Wisconsin unanimously believe that, any law that treats people with mental retardation differently from non-retarded people should be measured by the same standards as those dealing with discrimination on the basis of race, national origin, or gender.

STATEMENT BY DEBBIE VARNER, PRESIDENT, TEXAS ADVOCATES

I am Debbie Varner - President of Texas Advocates. Texas Advocates is a state-wide organization of people who are mentally retarded. We have about 325 members in thirteen local units. Our job is to help people who are retarded to speak out for their rights. It is also important for our organization to speak out on problems that trouble all people with mental retardation.

I just don't think it's right for cities to use strange laws to keep us from living in group homes if that's what we need. We have as much right to live in regular neighborhoods as anyone. Sometimes people think that if people who are retarded move in that it will ruin their neighborhood. That's just not true. In fact, I think most people with mental retardation would make good neighbors. After all, many of us right now live in regular neighborhoods either on our own or with our families.

Many Texas Advocates members and others with retardation would like to live in group homes. We want to be able to enjoy community life just like everyone else. But laws like the one in Cleburne keep us from living in regular neighborhoods and from enjoying community

life. They violate our rights and show that city officials don't respect us as citizens. That's not right or fair. Texas Advocates want to do something about this problem.

The decision The Supreme Court makes in the Cleburne case could affect my life and my rights as well as those of many other people with mental retardation.

STATEMENT OF SPEAKING FOR OURSELVES

Speaking For Ourselves is an organization run by and for people labeled mentally retarded. We have over 500 members living in group homes, institutions, at home with their parents and attending sheltered workshops throughout southeastern Pennsylvania. Many of our members are part of the plaintiff class in the *Pennhurst* case.

We know that people think that we are bad company. They think that we go around hurting people and that we don't know how to do anything.

We know that many of our neighbors don't want us to live nearby because we can't talk straight . . . can't walk straight. We've had neighbors call us names. We've had neighbors' kids throw snowballs at us.

We are human beings, just like everyone else. God put us all here. We have a right to live in the community. Everyone is equal under the law. How would the neighbors feel if they were their family members and no one would let them live there? The neighbors have no right to chase anyone out of their home just because they are handicapped. Nobody should have their home taken away simply because they are "retarded." Where are they supposed to live? Out in the street? In institutions?

The issue is that we have a right to live in the community and no one should be able to take that right away from us.

STATEMENT OF S.T.A.N.D. TOGETHER OF MARYLAND

S.T.A.N.D. Together is the state board for the Maryland Self Advocacy Movement for adults with developmental disabilities working together in spirit, teamwork, and new determination. We are fifteen elected representatives who represent over 400 members of Self-Advocacy groups throughout Maryland. Our purpose is to advocate in a unified way on issues of concern to all persons with disabilities.

We feel very strongly about the *Cleburne* case. People with disabilities should have the same rights and guarantees of law as all citizens. We should not be discriminated against nor segregated because we are mentally retarded or in a wheelchair. We worked for many years to free ourselves from inhumane institutional existence so that we could live in an integrated and free society. We are contributing citizens of society who strive to uphold the law and use our skills and capabilities in positive ways. Living in the community cannot be denied to us just because we are disabled. We strongly abhor any person or ordinance that wrongfully labels us "feebleminded". That is a gross insult to our humanness and personal dignity. No citizen should have to prove their worth as a human being to be granted equal protection under the law.

STATEMENTS BY MEMBERS OF PEOPLE FIRST OF MICHIGAN

"You won't learn very much in an institution. It's best to be where you can work and see how things are done in the community."

"You don't get to go anywhere like movies, baseball games, or other things when you're in an institution."

"In institutions you are watched 24 hours a day. I live in a family home where I am treated like a member of the family. In most independent homes you get to do more. That's why we prefer that we should have more group homes."

"I was in [an institution] for 15 years. It wasn't very nice. A group home is better. That way you are not tied up in an institution. In the institution they used to stand people up in the corner and other things I can't tell about."

"I'm in a group home where it's safe. I can learn to go places like downtown, to church and home. I can learn what I can do or can't do."

"In group homes they're not as strict on us as at (an institution). In a group home, if you act up, they can handle you in a more adult way rather than placing you in a straight jacket or in a lock up."

"At the institution I came from, they were too strict."

"When my father died, my mother thought about placing me in an institution, but she found a group home and that was really great."

"People need a place to go like a group home when their family can no longer take care of them."

"In the institution, they cut your hair, even when you don't want it."

"Giving you a choice —in the institution, they used to sterilize people without their permission."

"In institutions they tied up Bruce D. (a friend of mine) in a chair all the time."

"I knew a man [in an institution] who was strapped down in his bed."

"I had a friend who was in an institution and they did a lot of things to him that were wrong. People should have a chance to prove what they are worth."

"An institution is: looking at four walls: living in smelly rooms; and you have to do what they tell you to do. You can't make your own decisions."

"We are people first. We are adults and should be treated like adults."

"Institutions are no place for human beings."

STATEMENTS BY MICHAEL KENNEDY AND PATRICIA KILLINS, COORDINATORS OF SELF-ADVOCATES OF CENTRAL NEW YORK

We are self-advocacy coordinators for Self-Advocates of Central New York. We feel strongly about our right to live in the community. I (Michael) lived in 3 New York institutions for people called mentally retarded for 15 years. I have cerebral palsy and use a wheelchair. Now I live in a Medicaid-supported apartment with 3 other people with severe disabilities. Anyone who says I can't live in their neighborhood doesn't know me.

I (Patricia) lived in 2 state institutions for a total of 18 years. I am blind, have cerebral palsy and use a wheel chair. Now I live in an apartment similar to Mike's. When I lived in the institution, I helped other people get out. Then I thought I'd better start looking out for myself. Some places didn't even give me a chance because of my disabilities. Finally I got out.

More people could get out of the institution if there were more group homes and apartments like ours. People who don't want us living in their neighborhoods shouldn't be afraid of us because we're disabled. They're just reacting to silly labels like "retarded" or "handicapped." We don't like those labels. They should treat us like people with the same rights that they have.

STATEMENT OF CAPITOL PEOPLE FIRST, INCORPORATED

Capitol People First, Inc. is a non-profit organization of adults with mental retardation who advocate for their own rights both as citizens and as persons with developmental disabilities, and who advocate for the rights of all other developmentally disabled people as well.

In 1984, members of Capitol People First wrote a report under contract to the California State Council on Developmental Disabilities entitled: *Surviving in the System: Mental Retardation and the Retarding Environ-*

ment. To our knowledge, that report was the first to use the phrase "the retarding environment." The phrase can be very useful for describing what happens to people who are defined by the community as having mental retardation.

Not only do people with mental retardation have to struggle with their biological impairments, but they also have to struggle both with service systems and with public attitudes which all too often conspire to prevent growth and development for which there is a genuine potential. As we understand *Cleburne*, the issue is a local zoning ordinance which denies people diagnosed as having mental retardation the same access to residential locations in that community that is available without question to people who are not diagnosed as "feebleminded." Many of us have been subjected to open or masked discrimination of this sort, and we know that it has contributed to keeping the social environment we live in a "retarding" one.

APPENDIX D
BIBLIOGRAPHICAL NOTE ON HISTORICAL SOURCES: EUGENICS, RACE, RETARDATION, IMMIGRATION

Amici ARC/USA, *et al.* offer this note on the leading scholarly historical works that describe the conditions during the period 1896-1930, particularly as they relate to eugenics, race, retardation and immigration. In that Era, blacks, immigrants and retarded persons all were singled out for exclusion from society, and similar ideologies and stereotypes were developed to justify that exclusion. The leading works on Jim Crow, on the movement for racial restrictions on immigration, and on the movement to segregate retarded persons are most instructively read together because they describe different facets of a single social process and historical experience.

C. V. Woodward's classic, *The Strange Career of Jim Crow* (3d rev. ed. 1974), shows how the southern regime of *de jure* segregation arose, in the early decades of the 20th century, and traces the forces in the North, including the problems presented by immigration and imperial ventures abroad, that allowed this regime to emerge. Woodward, as well as R. Kluger, *Simple Justice* (1975), and J. H. Franklin's standard text, *From Slavery to Freedom* (5th ed. 1980), which both document the pervasive racism directed against blacks in the North and the South during this Era, should therefore be read in conjunction with the standard works on immigrants in the United States. T. J. Archdeacon's *Becoming American* (1983), the most comprehensive work on the history of immigration, contains an excellent account of the social impact of the "new immigration" of the period 1890-1930. J. Higham's *Strangers in the Land* (2d ed. 1978) is a useful synthetic account of American nativism as a common set of attitudes underlying the treatment of blacks and immigrants in the North and in the South. Higham

also documents the transformation of inchoate nativist sentiments among Americans of "older stock" into a coherent racial ideology during this period.

The eugenics movement developed during this period. Northerners and southerners alike were receptive to such ideas to explain crime, vice, and the variety of other intractable social problems created by industrialization as the product of the innate genetic inferiority of those who differed from themselves. They were equally receptive to the solution offered by eugenics to those ills: segregating and excluding blacks, immigrants, and "the feeble-minded," whom they held responsible. M. Haller's classic *Eugenics* (1963) is an excellent general account of the history of the eugenics movement of the Era and its translation into legislation. Haller documents the common origins of the campaign for the segregation of "the feeble-minded" and the campaign for restrictive immigration laws, and shows how those movements drew on the Jim Crow laws in the South (which were thought to serve a eugenic purpose) to support their own similar goals. K. M. Ludmerer shows in *Genetics and American Society* (1972), a good overview of the subject, that eugenics was a popular social and political movement rather than a scientific one and in fact was rejected by the leading geneticists of the Era. L. Kamin, *The Science and Politics of IQ* (1974), and S. J. Gould, *The Mismeasure of Man* (1981) are both excellent accounts of the transformation of intelligence testing during this period into a political tool to exclude those of "innately inferior" non-Nordic ethnic backgrounds and to segregate retarded persons. D. Kevles, *Annals of Eugenics*, New Yorker, October 8, 15, 22, 29, 1984, also provides an overview of the eugenics movement and its impact on legislation and policy toward retarded people and toward immigrants.

Works that focus on the origins of segregated custodial institutions in the early decades of the 20th century show how the era's general approach and remedy for social problems was applied specifically to retarded

persons. P. Tyor, *Segregation or Surgery* (Diss. Nw. Univ. 1972), *published in* P. Tyor and L. Bell, *Caring for the Retarded in America* (1972), is the most comprehensive history of the development of retardation institutions during the period 1850-1920 and the transformation of institutions from short-term training programs to custodial facilities designed for life-long segregation. Both Tyor and W. Wolfensberger, *The Origin and Nature of Our Institutional Models* (1975), another excellent source for the evolution of retardation institutions, analyze the relationship between eugenist attitudes toward retarded people as a "menace" to society and the institutional models developed to implement those attitudes. That social reformers interested in retarded persons shared the racial and hereditarian attitudes of the Era and its devaluation of non-whites and non-Nordics as well as retarded persons, is clear from these accounts and from Sarason and Doris, *Educational Handicap, Public Policy, and Social History* (1979), an analysis of the impact of industrialization and immigration on the social institutions of the period. Sarason and Doris focus on the experience of retarded persons segregated in or excluded from the public schools.

The hostility and stereotypes of the Era toward retarded persons are well-documented in these works, particularly in Tyor and Wolfensberger. To make the comparison with the ideology of Jim Crow, they should be read in conjunction with R. Kluger, *supra*, I. A. Newby, *Jim Crow's Defense* (1965), and G. M. Frederickson, *The Black Image in the White Mind* (1971).

The legacy of the segregation of retarded persons is most recently documented in D. and S. Rothman, *The Willowbrook Wars* (1984).

MOTION FILED
FEB - 1 1985

No. 84-468

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,
PETITIONERS
v.
CLEBURNE LIVING CENTER, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to File a Brief Amici Curiae and Amici Curiae Brief of The National Association for Rights Protection and Advocacy; The Normalization Safeguards Project; The Foundation for Dignity; The Brums Foundation; and the Plaintiffs in: Brewster v. Dukakis (D. Mass.); Connecticut Association for Retarded Citizens v. Thorne (D. Conn.); E.H. v. Martin (W.Va. Sup. Ct.); Garrity v. Sununu (D.N.H.); Gustafson v. Mahoney (D. Mass.); Halderman v. Pennhurst (E.D. Pa.); Isomone v. Garrahy (D.R.I.); Lelsz v. Kavanagh (E.D. Tex.); Mental Health Association of Los Angeles v. Deukmejian (Cal. Super. Ct.); Massachusetts Association for Retarded Citizens v. Dukakis (D. Mass.); Michigan Association for Retarded Citizens v. Smith (E.D. Mich.); Medley v. Ginsberg (S.D. W.Va.).

STEVEN J. SCHWARTZ*
Center for Public Representation
Northampton State Hospital
Northampton, Massachusetts 01060
(413) 584-1644, Ext. 265

DAVID FERLEGER*
BARBARA HOFFMAN
37 South 20th Street
Philadelphia, Pennsylvania 19103
(215) 567-2828

**Counsel of Record*
Additional Counsel Listed in Appendix A

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

No. 84-468

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,
PETITIONERS
v.
CLEBURNE LIVING CENTER, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to File a Brief Amici Curiae on Behalf of The National Association for Rights Protection and Advocacy; The Normalization Safeguards Project; The Foundation for Dignity; The Brums Foundation; and the Plaintiffs in: Brewster v. Dukakis (D. Mass.); Connecticut Association for Retarded Citizens v. Thorne (D. Conn.); E.H. v. Martin (W.Va. Sup. Ct.); Garrity v. Sununu (D.N.H.); Gustafson v. Mahoney (D. Mass.); Halderman v. Pennhurst (E.D. Pa.); Isomone v. Garrahy (D.R.I.); Lelsz v. Kavanagh (E.D. Tex.); Mental Health Association of Los Angeles v. Deukmejian (Cal. Super. Ct.); Massachusetts Association for Retarded Citizens v. Dukakis (D. Mass.); Michigan Association for Retarded Citizens v. Smith (E.D. Mich.); Medley v. Ginsberg (S.D. W.Va.).

Pursuant to Sup. Ct. R. 36.3, Amici respectfully request the Court for leave to file a brief *amici curiae*. Amici support the position of the respondents on the questions presented but also argue that the case is moot, that state law controls, and therefore that the writ should be dismissed as improvidently granted.

Petitioners have not responded to a request for consent. See Letters to Parties' Counsel, Appendix 1. Respondents have indicated their objection to this brief.

Amici are people with retardation and related handicaps, as well as professional, advocacy, and charitable organizations, who have a vital and direct interest in the questions before the Court. Amici include tens of thousands of citizens who were born with a mental disability or who have otherwise been labelled as mentally handicapped. These individuals and the organizations which represent them are all plaintiffs in the following pending cases brought to protect their freedom to move into normal community homes in integrated neighborhoods: *Brewster* v. *Dukakis*, C.A. 76-4423-F (D. Mass.); *Connecticut Association for Retarded Citizens* v. *Thorne*, C.A. 1478-653 (D. Conn.); *E.H.* v. *Martin*, C.A. Misc. 81-584 (W. Va. Sup. Ct.); *Garrity* v. *Sununu*, C.A. 78-116 (D.N.H.); *Gustafson* v. *Mahoney*, C.A. 78-3040-MC (D. Mass.); *Halderman* v. *Pennhurst*, C.A. 74-1345 (E.D. Pa.); *Isomone* v. *Garrahy*, C.A. 77-727 (D. R.I.); *Lelsz* v. *Kavanagh*, C.A. S-74-95 (E.D. Tex.); *Mental Health Association of Los Angeles* v. *Deukmejian*, C.A. 000-540 (Cal. Super. Ct.); *Massachusetts Association for Retarded Citizens* v. *Dukakis*, C.A. 75-5023-T and 75-5210-T (D. Mass.); *Michigan Association for Retarded Citizens* v. *Smith*, C.A. 78-70384 (E.D. Mich.); *Medley* v. *Ginsberg*, C.A. 78-2099 CH (S.D. W.Va.).

Amici also include professional and advocacy organizations dedicated to assisting people with retardation. The Normalization Safeguards Project is a training and technical assistance organization which was established in 1980 to disseminate professional opinion on the design, management and integration of community services for people with retardation and other handicaps. The National Association for Rights Protec-

tion and Advocacy (NARPA) is the only national organization which addresses both mental health and retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and retardation services.

Finally Amici include two foundations. The Foundation for Dignity is a charitable organization established in Pennsylvania and devoted to public and professional education regarding the needs and rights of people with disabilities and other people who have been devalued or disadvantaged as a class. The Brums Foundation, a Texas charity, is especially interested in this case since its sole purpose is to protect the constitutional and other rights of institutionalized people with retardation, especially in its home state.

The daily lives and work of the Amici, their members and constituents, will be affected by any decision in this case on the merits. Amici are particularly qualified to inform the Court of the preference of retardation professionals for community living and the concerns of people with retardation who are being excluded from local neighborhoods. Because of their experience and perspective, Amici are in a unique position to present and analyze the professional literature and research which form the foundation for the expert judgment favoring community living. Neither party before the Court has undertaken such a review nor discussed the professional consensus which forms the basis for Texas' decision to fund community homes such as that proposed by Cleburne Living Center. This consensus provides the context for resolving the merits of this case and for determining the relevance, for equal protection analysis, of the unfortunate history of segregating people with retardation in institutions.

Amici also discuss the question of whether the writ of certiorari should be dismissed as improvidently granted because of issues of mootness and preemption of state law. Neither of these issues are briefed by the parties, even though they each provide a prudential ground for avoiding the decision of a complex constitutional question.

Respectfully submitted,

STEVEN J. SCHWARTZ*
Center for Public Representation
Northampton State Hospital
Northampton, Massachusetts 01060
(413) 584-1644, Ext. 265

DAVID FERLEGER*
BARBARA HOFFMAN
37 South 20th Street
Philadelphia, Pennsylvania 19103
(215) 567-2828

January 23, 1985

**Counsel of Record*

CENTER FOR PUBLIC REPRESENTATION

Mental Patients Advocacy Project
Northampton State Hospital
Northampton, MA 01061
413/584-1644, Ext. 265

December 26, 1984

Earl Luna, Esq.
2416 LTV Tower
1525 Elm Street
Dallas, TX 75201

Dear Mr. Luna:

We are currently drafting an amicus brief to the United States Supreme Court which we expect to file in *City of Cleburne v. Cleburne Living Center*. The brief is being written on behalf of the National Association for Rights Protection and Advocacy, plaintiff class representatives in a number of deinstitutionalization cases throughout the country, the Foundation for Dignity, and possibly other organizations.

We are writing pursuant to U.S. Supreme Court R. 36.2 to request your consent to the submission of this brief. We would appreciate hearing from you as soon as possible in order to determine the appropriate way to proceed with this matter. Thank you for your attention.

Sincerely,

/s/ _____
Steven J. Schwartz
Attorney

SJS/sad
cc: David Ferleger

CENTER FOR PUBLIC REPRESENTATION

Mental Patients Advocacy Project
Northampton State Hospital
Northampton, MA 01061
413/584-1644, Ext. 265

December 26, 1984

Diane Shisk, Esq.
Advocacy, Inc.
7700 Chevy Chase Drive
Suite 300
Austin, TX 78752

Dear Ms. Shisk:

We are currently drafting an amicus brief to the United States Supreme Court which we expect to file in *City of Cleburne v. Cleburne Living Center*. The brief is being written on behalf of the National Association for Rights Protection and Advocacy, plaintiff class representatives in a number of deinstitutionalization cases throughout the country, the Foundation for Dignity, and possibly other organizations.

We are writing pursuant to U.S. Supreme Court R. 36.2 to request your consent to the submission of this brief. We would appreciate hearing from you as soon as possible in order to determine the appropriate way to proceed with this matter. Thank you for your attention.

Sincerely,

/s/ _____
Steven J. Schwartz
Attorney

SJS/sad
cc: David Ferleger

Table of Contents

Interest of amici 1

Summary of argument 2

Argument 4

I. Certiorari was improvidently granted because a) the case is moot and b) state law prevents the city's exclusion of the community home 4

A. This case is moot because the proposed group home does not comply with current Texas law governing the size of ICF-MR facilities 4

B. The Cleburne Zoning Ordinance is contrary to the state's policy of promoting community services for people with retardation 6

II. This Court's decision should defer to the current professional judgment to provide individualized habilitation with a preference for small community settings rather than large institutions 7

A. People with retardation make good neighbors 7

1. The public welfare: benefits to people with retardation 7

2. The public welfare: benefits to families and neighbors 10

3. The public welfare: the public treasury 14

4. The public welfare: state policy 16

B. People with retardation in large institutions 18

III. People with retardation, like other minorities before them, cannot be excluded from our neighborhoods nor denied equal opportunities in our communities 20

Conclusion 23

Appendix A 1a

Table of Authorities Cited

CASES

Board of License Commissioners v. Pastore, 53 U.S.L.W. 4057 (Jan. 8, 1985) 4

Brewster v. Dukakis, C.A. 76-4423-7 (D. Mass.) 1n

Connecticut Association for Retarded Citizens v. Thorne, C.A. 1478-653 (D. Conn.) 1n

E.H. v. Martin, C.A. Misc. 81-584 (W. Va. Sup. Ct.) 1n

Garrity v. Sununu, C.A. 78-116 (D.N.H.) 1n

Gustafson v. Mahoney, C.A. 78-3040-MC (D. Mass.) 1n

Halderman v. Pennhurst, C.A. 74-1345 (E.D. Pa.) 1n

Isomone v. Garrahy, C.A. 77-727 (D.R.I.) 1n

Kremens v. Bartley, 431 U.S. 119 (1977) 4

Lelsz v. Kavanagh, C.A. S-74-95 (E.D. Tex.) 1n, 6

Massachusetts Association for Retarded Citizens v. Dukakis, C.A. 75-5023-T and 75-5210-T (D. Mass.) 1n

Medley v. Ginsberg, C.A. 78-[illegible]099 CH (S.D. W.Va.) 1n

Mental Health Association of Los Angeles v. Deukmejian, C.A. 000-540 (Cal. Super. Ct.) 1n

Michigan Association for Retarded Citizens v. Smith, C.A. 78-70384 (E.D. Mich.) 1n

Parham v. J.R., 422 U.S. 584 (1979) 18n

Society for Good Will to Retarded Children v. Cuomo, 572 F.Supp. 1300 (E.D. N.Y. 1983) 12n

Youngberg v. Romeo, 457 U.S. 307 (1982) 17, 18n

STATUTES

29 U.S.C., § 794 16

Massachusetts Constitution
Article 114 16

Massachusetts General Laws
c. 19, § 17 (1966) (West) 14n

N.Y. Mental Hyg. Law 13.01 (1977) (McKinney) 14n

Calif. Welf. and Inst. Code 5450 (as amended, 1979)
(West) 14n

Colo. Rev. Stat. Section 27-10.5-101 (1975) 14n

Fla. Stat. Ann. Sec. 393.062 (West. Supp. 1978) 14

Tex. Vernon's Ann. Civ. St. Art. 5547-300 (Mentally
Retarded Persons Act) 6, 14n

Tex. Rev. Civ. Stat. 1011A 6

MISCELLANEOUS

Balakrishnan & Wolf, Life Expectancy of Mentally
Retarded Persons in Canadian Institutions, 80 Am. J.
Mental Deficiency 650 (1976) 19n

Behavior Modification of the Mentally Retarded
(T. Thompson & J. Grabowski eds. 1977) 17n

Belknap, Human Problems of State Mental Hospitals
(1956) 19n

B. Braginsky & D. Braginsky, Hansels & Gretels (1975) 19n

Bruininks, Thurlow, Thurman and Fiorelli, Deinstitu-
tionalization and Community Services, in 11 Mental
Retardation and Developmental Disabilities (J. Wor-
tis ed. 1980) 8n

Craig and McCarver, Community Placement and Ad-
justment of Deinstitutionalized Clients: Issues and
Findings, in 12 International Review of Research in
Mental Retardation (N. Ellis and N. Bray eds. 1984) 9n,
15n, 16n, 19n

Craig and McCarver, Placement of the Retarded in the Community: Prognosis and Outcome, in 7 International Rev. of Research in Mental Retardation (N. Ellis ed. 1974) 19n

Davies, Social Control of the Mentally Deficient (1930) 15n, 16n

Deutsch, The Mentally Ill in America (2d ed. 1949) 11n

Edgerton, Failure in Community Adaptation: The Relativity of Assessment, in Environment and Behavior: The Adaptation of Mentally Retarded Persons (Kernan, Begab and Edgerton, eds. 1983) 13n

Edgerton, The Cloak of Competence (1967) 19n

Ferleger, Anti-Institutionalization and the Supreme Court, 14 Rutgers L.J. 595 (1983) 10, 16n, 17n

Forssman & Akesson, Mortality of the Mentally Deficient: A Study of 12,903 Institutionalized Subjects, 14 J. Mental Deficiency Research 276 (1970) 19n

Friedman, Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons, 17 Ariz. L. Rev. 39 (1975) 17n

Gottwald, Public Awareness About Mental Retardation (Arlington, Va: Council on Exceptional Children, 1970) 13n

Gunnar Dybwad, A Society Without Institutions?, Residential Alternatives Symposium, University of Hartford (Dec. 9, 1978) 15n

Heal, Sigelman and Switzky, Research on Community Residential Alternatives for the Mentally Retarded in Normalization, Social Integration and Community Services (R. Flynn and K. Nitsch eds. 1980) 9n

Herr, Rights and Advocacy for Retarded People (1983) 18n

Janicki, Mayeda and Epple, Availability of Group Homes for Persons with Mental Retardation in the United States, Mental Retardation (1983) 15n

Kenefick, Court Decisions: The Impact of Litigation, in 12 Mental Retardation and Developmental Disabilities (J. Wortis ed. 1981) 8n

King, N. Raynes & J. Tizard, Patterns of Residential Care: Sociological Studies in Insitutions for Handicapped Children (1971) 19n

Kirman, Some Current Trends, in 12 Mental Retardation and Developmental Disabilities (J. Wortis ed. 1981) 15n

Latib, Conroy and Hess, Family Attitudes Toward Deinstitutionalization, in 12 International Review of Research in Mental Retardation (N. Ellis & Bray eds. 1984) 12n, 14n

Lauber and Bangs, Zoning for Family Group Care Facilities (Planning Advisory Group Rep. No. 300) (Chicago: American Society of Planning Officials (1974)) 11n

Mamula and Newman, Community Placement of the Mentally Retarded: A Handbook for Community Agencies and Social Work Practitioners (1973) 11n, 12n

McClennen, R. Hoerkstra & J. Bryan, Social Skills for Severely Retarded Adults (1980) 17n

McCormick, Balla & Zigler, Resident-Care Practices in Institutions for Retarded Persons: A Cross-Institutional, Cross Cultural Study, 80 Am. J. Mental Deficiency 1 (1975) 19n

Nelson & Crocker, The Medical Care of Mentally Retarded Persons in Public Residential Facilities, 299 New Eng. J. Med. 1039 (1978) 15n, 20n

Nirje, The Normalization Principle and Its Human Management Implications, in President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (R. Kugel & W. Wolfensberger eds. 1969) 8n

O'Connor, Home is a Good Place: A National Perspective of Community Residential Facilities for Developmentally Disabled Persons (Monograph No. 2), (Washington D.C.: American Association on Mental Deficiency (1976)) 12n

Okolo and Guskin, Community Attitudes Toward Community Placement of Mentally Retarded Persons, in 12 International Review of Research in Mental Retardation (N. Ellis and N. Bray eds. 1984) 11n, 12n, 13n

Plotkin & Gill, Invisible Manacles: Drugging Mentally Retarded People, 31 Stan. L. Rev. 637 (1979) 20n

President's Committee on Mental Retardation Gallup Poll Shows Attitudes on Mental Retardation Improving, President's Committee on Mental Retardation Message (Washington, D.C.: April, 1975) 13n

Roos, Basic Facts About Mental Retardation, in 1 Legal Rights of Mentally Disabled Persons (P. Friedman ed. 1979) 16n

Scheerenberger, A History of Mental Retardation (1983) 10, 18

Scheerenberger, Public Residential Services for the Mentally Retarded (1983) 15n, 16n

Tarjan, Natural History of Mental Retardation in a State Hospital Revisited: Releases and Deaths in Two Admission Groups, Ten Years Apart, 117 Am. J. Diseases Children 609 (1969) 19n

Taylor & Bogdan, Defending Illusions: The Institution's Struggle for Survival, 39 Hum. Organization 209 (1980) 19n

Temple University and Human Services Research Institute, Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary (Contract Report to U.S. Department of Health and Human Services 1983) 9n, 10n, 14n

Tizard, The Role of Social Institutions in the Causation, Prevention, and Alleviation of Mental Retardation (1970) 19n

Vail, Dehumanization and the Institutional Career (1966) 19n

Whitman & Sciback, Behavior Modification Research With the Severely and Profoundly Retarded, in Handbook of Mental Deficiency: Psychological Theory and Research (N.R. Ellis ed. 1979) 17n

Wing, Institutionalism in Mental Hospitals, 1 Brit. J. Soc. & Clinical Psychology 38 (1962) 19n

Interest of Amici

Amici* are people with retardation and related handicaps,[1] as well as professional,[2] advocacy,[3] and charitable organizations,[4] who have a vital and direct interest in the questions be-

---

* A motion for leave to file a brief amicus curiae has been filed in the absence of written consent from both parties.

[1] The plaintiffs in the following pending cases are all current or prospective residents of state institutions or community homes in their respective states: *Brewster* v. *Dukakis*, C.A. 76-4423-F (D. Mass.); *Connecticut Association for Retarded Citizens* v. *Thorne*, C.A. 1478-653 (D. Conn.); *E.H.* v. *Martin*, C.A. Misc. 81-584 (W.Va. Sup. Ct.); *Garrity* v. *Sununu*, C.A. 78-116 (D.N.H.); *Gustafson* v. *Mahoney*, C.A. 78-3040-MC (D. Mass.); *Halderman* v. *Pennhurst*, C.A. 74-1345 (E.D. Pa.); *Isomone* v. *Garrahy*, C.A. 77-727 (D.R.I.); *Lelsz* v. *Kavanagh*, C.A. S-74-95 (E.D. Tex.); *Mental Health Association of Los Angeles* v. *Deukmejian*, C.A. 000-540 (Cal. Super. Ct.); *Massachusetts Association for Retarded Citizens* v. *Dukakis*, C.A. 75-5023-T and 75-5210-T (D. Mass.); *Michigan Association for Retarded Citizens* v. *Smith*, C.A. 78-70384 (E.D. Mich.); *Medley* v. *Ginsberg*, C.A. 78-2099 CH (S.D. W.Va.).

[2] The Normalization Safeguards Project is a training and technical assistance organization which was established in 1980 to disseminate professional opinion on the design, management and integration of community services for people with retardation and other handicaps. The Project has assisted state and local officials, civic organizations, and private agencies which provide community services in developing new homes in local neighborhoods for retarded citizens.

[3] The National Association for Rights Protection and Advocacy (NARPA) is the only national organization which addresses both mental health and retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and retardation services. NARPA was formed in 1979 as a result of coordinating efforts of the National Institute of Mental Health. Among NARPA's hundreds of members are people who design, live and work in community and institutional services for people with retardation.

[4] The Foundation for Dignity is a charitable organization established in Pennsylvania and devoted to public and professional education regarding the needs and rights of people with disabilities and other people who have been devalued or disadvantaged as a class.

The Brums Foundation, a Texas charity, is especially interested in this case since its sole purpose is to protect the constitutional and other rights of institu-

fore the Court. The daily lives and work of the Amici, their members and constituents, will be affected by any decision in this case on the merits.

Amici are particularly qualified to inform the Court of the fundamental and contextual issues in this case, including the preference of retardation professionals for community living and the concerns of people with retardation who are being excluded from local neighborhoods. Amici and their members include state mental health and retardation officials, administrators of facilities for people with handicaps, academic and clinical researchers and therapeutic practitioners in the field, advocates employed or appointed by state agencies, charitable foundations devoted to educational and public service with regard to disabilities, and, perhaps with the greatest stake in the outcome of this case, people with retardation themselves, whose right to live in the community of their choice is before the Court.

Summary of Argument

Although this case raises important issues, the Court ought to dismiss certiorari for two reasons. First, the case is moot. After the date on which the respondent, Cleburne Living Center, Inc. (CLC) filed its application for certification of a thirteen bed residential program with the state licensing agency, the Texas Department of Human Resources' regulations were modified to limit such residences to a maximum of six beds. These regulations make no provision for grandfathering prior

---

tionalized people with retardation, especially in its home state. As a result of the drowning death of Mark Jones, an eighteen year old resident of the Fort Worth State School, his family established Brums to help ensure that people with retardation in Texas institutions are provided the opportunity for full and dignified lives.

applications or otherwise waiving this limit. CLC's application has never been and could not now be approved under the new regulation.

Second, the ordinance is in conflict with Texas law which incorporates a clear mandate to encourage the development, on a nondiscriminatory basis, of new community homes for people with retardation. The City can hardly claim to be advancing State interests by promulgating a zoning ordinance which erects substantial impediments to the establishment of such homes.

If the Court chooses to address the constitutional question, it should adopt a standard which reflects appropriate deference to the professional judgment of retardation experts who clearly prefer community living over needless institutional confinement. This judgment has been adopted by Texas and most, if not all, of the states and it furthers the public welfare through a) improvement of the quality of life for people with retardation, b) advancement of the interests of families, neighbors, and local communities, c) protection of the public fisc, and d) furtherance of a number of long-standing state policies. In addition, this professional and political judgment avoids the harms of life-long institutionalization and is currently being widely implemented by many states.

People with retardation, like other disfavored groups before them, have been subjected to prejudice, exclusion and unequal treatment solely by reason of characteristics determined at birth. Although these defining traits may in some cases require certain accommodations to people on an *individual* basis, the history of hostility and discrimination has been directed at retarded people as a *class*, by reason of their membership in this class. The Fourteenth Amendment has never required that individual differences between people be ignored in governmental decision-making; it has required, however, that such decisions not be based on status and other class-wide charac-

teristics, especially those which are founded on false and derogatory stereotypes. As with other insular minorities, the pattern of discrimination often focuses upon excluding people with retardation from residential neighborhoods or the imposition of burdensome procedures which unduly restrict their freedom to leave confining institutions and to live in the communities of their choice. If the Court reaches the merits, the judgment below should be affirmed.

Argument

I. Certiorari Was Improvidently Granted Because A) the Case is Moot and B) State Law Prevents the City's Exclusion of the Community Home.

A. *This Case is Moot Because the Proposed Group Home Does Not Comply with Current Texas Law Governing the Size of ICF-MR Facilities.*

Under present Texas law, the proposed group home would violate state regulations. The decisions below were based on prior law. This Court must review the record below in light of state law as it stands today, not as it stood at the time of trial. *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

The changed facts here have the identical effect as those in *Board of License Commissioners* v. *Pastore*, 53 U.S.L.W. 4057 (Jan. 8, 1985), in which "no decision on the merits by this Court can now have an affect on the . . . license," and "[T]he case is therefore moot." *Id.* at 4058.

At the time Cleburne Living Center filed its initial application for the home and at the time of trial on April 26 through April 28, 1983, the licensing rules of the Texas Department of Human Resources (TDHR) required, as a condition of certification, that certain intermediate care facilities for people with retardation be limited to a maximum of *fifteen* beds per

facility. On May 1, 1982, several days post-trial but before any certification was granted, new regulations took effect which limited the number of beds to *six* per facility. 40 T. A. C. 27.203. The new regulation reads:

> (a) Effective May 1, 1982, all applications (I, V, VI) for participation in the ICF-MR Program . . . must meet the following requirements.
>
> (1) Requested certification will be limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility.

J.A. 79-80.

The lower courts made no finding that the size limit in the former regulation was applicable to this CLC house. Rather, the court merely found that a CLC official "claimed" that the "new regulation does not apply" to the facility. Finding of Fact No. 38; J.A. 96.

CLC based its claim on a letter from the Commissioner of TDHR to counsel for Respondents. J.A. 37, 77. The letter, dated November 4, 1981, did not address the applicability of the "new" six-bed regulation. It could not have addressed this limit since the regulation was not in existence at that time and, in fact, was not issued until December 22, 1981. Def. Ex. 10; J.A. 78-79. The procedural extension of time set forth in the November letter and relied on by the CLC official had nothing to do with waiver of a substantive certification requirement.

The six-bed limit regulation applies to "*all applications,*" J.A. 79, and includes no exceptions or grandfathering provision. The record does not reflect any contrary practice or interpretation by TDHR.

The state had not certified the home at the time the City Council considered a special use permit for the thirteen bed

home. Finding of Fact No. 37; J.A. 96. Texas law now prohibits certification of intermediate care facilities such as that reviewed by the City Council. Issues arising from the City Council's consideration of a special use permit are moot because the application at issue cannot result in certification of a facility for people with retardation.

B. *The Cleburne Zoning Ordinance is Contrary to the State's Policy of Promoting Community Services for People with Retardation.*

The Texas Zoning Enabling Act gives the City of Cleburne the authority to promulgate zoning regulations which serve legitimate *state interests*. Tex. Rev. Civ. Stat. 1011A. As the State itself explains in its amicus brief, Texas law prevents the exclusion of community homes from Cleburne. The State of Texas has an explicit policy of promoting the development of community services for people with retardation. Tex. Vernon's Ann. Civ. St. Art. 5547-300 (Mentally Retarded Persons Act); *Lelsz* v. *Kavanagh*, No. S-74-95-CA (E.D. Tex., July 21, 1983 Consent Decree). The zoning ordinance severely restricts the development of community services. Thus, the City of Cleburne can hardly claim that the zoning ordinance promotes legitimate state interests.

Because the validity of the ordinance turns on the extent to which the City exercised its zoning authority under state law, and because this Court need not consider the state law questions, a proper respect for the State's constitutional policy-making authority suggests that certiorari has been improvidently granted.

II. This Court's Decision Should Defer to the Current Professional Judgment to Provide Individualized Habilitation with a Preference for Small Community Settings Rather than Large Institutions.

Should the Court reach the merits of the Equal Protection issues, it should do so in a way that defers to the professional consensus which has emerged in Texas and throughout the nation to provide people with retardation with individualized habilitation, preferably in small community settings. Amici strongly urge the Court to ensure that its decision in this case does not interfere with the states' policy-making and experimentation in this field.

The State of Texas has undertaken by statute and court decision to provide community services for people with retardation, favoring small community settings over large institutions. Sec. I.B., *supra*. Near the City of Cleburne are several large state retardation institutions and these, as well as the local community, would provide the residents for the CLC home. J.A. 33-34.

As discussed below, people with retardation are already our neighbors and contribute significantly to our communities. Establishing new homes for them is not a novel experiment but rather a long-accepted professionally designed approach to improving the public welfare in several ways: it provides a) benefits to people with retardation, b) benefits to families and neighbors, c) protection of the public fisc, and d) implementation of legislative policy.

A. *People With Retardation Make Good Neighbors.*

1. The Public Welfare: Benefits to People with Retardation.

Inherent in the consensus among mental retardation professionals are principles of normalization, least restrictive alterna-

tive and the developmental model of programming.[5] All three concepts are in conflict with institutionalization, which isolates people from the rhythms and opportunities of an integrated community life.[6]

The neglect, abuse and regression typically found in large inadequate institutions have not followed their former residents into the community. Small community residential programs generally provide residents a more appropriate and less restrictive environment in which to develop personal, social and vocational skills.

Community residential services assume a variety of forms ranging from foster families to residential settings with twenty-four hour per day staff.[7] If the person is under twenty-one years of age, he or she usually attends a public school program during the day. If the person is an adult, he or she participates in competitive work, a vocational training program, or other professionally developed day program.[8]

---

[5] Bruininks, Thurlow, Thurman and Fiorelli, *Deinstitutionalization and Community Services* in 11 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 55 (J. Wortis ed. 1980).

[6] For the President's Committee on Mental Retardation, Bengt Nirje summarized some of the reasons institutions fail at normalization:

> Large institutions and the conditions we can observe in their back wards can never offer facilities of the kind and quality that are essential. In the large machine-like atmosphere, the normal rhythm of daily routines of occupation, leisure, and personal life is emasculated to surrogate activities, not integrated with a meaningful personal existence. The normal rhythm of the year is mostly dwarfed through the experience of monotonous confinement. The development of individuality is helplessly mutilated and crushed in a life in herds.

Nirje, *The Normalization Principle and Its Human Management Implications*, in President's Committee on Mental Retardation, *Changing Patterns in Residential Services for the Mentally Retarded* 179, 186-187 (R. Kugel & W. Wolfensberger eds. 1969).

[7] Bruininks, Thurlow, Thurman and Fiorelli, *supra* n.5.

[8] Kenefick, *Court Decisions: The Impact of Litigation*, in 12 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 20, 45 (J. Wortis ed. 1981).

The size of community homes vary. Smaller residences promote a more normal, habilitative, home-like environment and are not "mini-institutions." In Pennsylvania, for example, community residences called Community Living Arrangements are designed to serve three or fewer individuals and have twenty-four hour staff coverage provided by either shift or live-in staff. Each resident has a written habilitation plan and attends one of several types of day programs.[9] Texas group homes house six or fewer people, in a program subject to regulation. J.A. 78-81.

It is not the existence or degree of retardation that limits people's ability to live in the community. Success of placement depends "primarily on the quality of the community support system rather than characteristics of individuals themselves."[10] Movement to family-scale community homes results in substantial increases in level of functioning and generally positive behavioral change for people with all levels of retardation. People who leave institutions[11] for the community quickly make significant adaptive behavior gains relative to those who remain institutionalized.[12]

Since 1978, the United States Department of Health and Human Services has funded an unprecedented, comprehensive

---

[9] Temple University and Human Services Research Institute, *Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary* (Contract Report to U.S. Department of Health and Human Services 1983) (hereafter, Temple University/HHS Study).

[10] Heal, Sigelman and Switzky, *Research on Community Residential Alternatives for the Mentally Retarded* in NORMALIZATION, SOCIAL INTEGRATION AND COMMUNITY SERVICES at 251 (R. Flynn and K. Nitsch eds. 1980).

[11] Most people who leave are returned to the community from which they entered the institution.

[12] *See* Craig and McCarver, *Community Placement and Adjustment of Deinstitutionalized Clients: Issues and Findings* in 12 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 95 (N. Ellis and N. Bray eds. 1984).

study of the movement of hundreds of people from a large institution to community homes of two to three residents. The results confirm that severely and profoundly retarded individuals benefit at least as much, and probably more, from community living than people with less extensive retardation. The people who had left institutions were found to have made more gains in terms of independent functioning and developmental growth than their institutionalized "twins." Community residents received more than ten hours per day of supportive, developmentally-oriented and structured service, as compared with an average of six hours a day when they were institutionalized.[13]

2. The Public Welfare: Benefits to Families and Neighbors.

Today and for the past hundred years, the national and state experience in returning people with retardation to their home communities has generally resulted in support of community living for people with retardation. However, because many Americans have become accustomed to segregating people with retardation in institutions, the increase in community living opportunities may bring initially hostile reactions from those who prefer to have the retarded "out of sight, out of mind."

Community homes are not new. They are neither experimental nor novel. The training of people with retardation — intensively and professionally — is based on the use of community day programs and family-scale community homes which are as old as or older than retardation institutions in the United States. R. Scheerenberger, *A History of Mental Retardation* (1983); Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 Rutgers L.J. 595, 614-616 (1983).

The "colony" system was one alternative to institutionalization which was developed contemporaneously with the growth

[13] Temple University/HHS Study, *supra*, note 9.

of large public institutions for people with retardation. Colonies were created to "relieve the parent institution of overcrowded conditions, to provide a less restricted and more congenial environment for patients fit for colony life, and to utilize their labor profitably." [14] They were established to provide "practical training for the patients under conditions as far as possible approaching the normal." [15] Located in established residential areas and in normal homes, colonies were a stable residential service for people at all levels of retardation.

In the late 1920's, neighborhood acceptance was achieved regularly and with little difficulty:

> So far as can be ascertained from careful inquiry, all of the girls' colonies are in good standing with their communities. They occupy good houses in the better residential sections. There are usually close neighborhoods. If at first the rumor that a house is to be occupied for such a purpose causes some misgivings in the neighborhood, that feeling is quickly dispelled when the colony begins to operate and it is seen how quiet and orderly the household proves to be.[16]

In recent years, some neighborhoods have expressed hostility to new community homes. However, opposition tends to decline once a residential facility has opened.[17] In one 1976 analysis, 89%

---

[14] A. Deutsch, THE MENTALLY ILL IN AMERICA 381 (2d ed. 1949).

[15] *Id.*

[16] S. Davies, SOCIAL CONTROL OF THE MENTALLY DEFICIENT 283-284 (1930).

[17] More than ten years of study have produced consistent data. *See* Lauber and Bangs, *Zoning for Family Group Care Facilities* (Planning Advisory Group Rep. No. 300) (Chicago: American Society of Planning Officials (1974)); Mamula and Newman, *Community Placement of the Mentally Retarded: A Handbook for Community Agencies and Social Work Practitioners* (1973); Okolo and Guskin, *Community Attitudes Toward Community Placement of*

of the programs studied claimed that opposition had decreased, pointing primarily to the acceptable behavior of residents.[18] Careproviders' records in a study in Fresno, California indicated that 96% of the residents had no recorded behavior difficulties in their neighborhoods.[19]

Family opposition to community homes for institutionalized relatives also decreases over time. A study of families whose relatives were moved to the community found that while over half initially strongly opposed movement to the community, 81% agreed with community living once the transition had been completed. Many people who were initially tentative or negative became convinced that community placement was a good idea after seeing their relatives settled in community homes.[20]

Available evidence does not support the concerns voiced by neighbors regarding the establishment of community residential programs.[21] On the contrary, this resistance is usually grounded in the same manifestations of prejudice and xenophobia which previously characterized the exclusion of other minorities. For example, there is the stereotypical fear that people with mental retardation will bring sexual deviance, crime and

---

Mentally Retarded Persons in 12 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 25 (N. Ellis and N. Bray eds. 1984).

[18] O'Connor, *Home is a Good Place: A National Perspective of Community Residential Facilities for Developmentally Disabled Persons* (Monograph No. 2), Washington D.C.: American Association on Mental Deficiency (1976).

[19] Mamula and Newman, *supra* n.17.

[20] Latib, Conroy and Hess, *Family Attitudes Toward Deinstitutionalization*, in 12 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 67 (N. Ellis and N. Bray eds. 1984).

[21] A New York state study indicated that community resistance derives from fear of decreased property values and fear of people with retardation as violent, dangerous and unfriendly. Both fears were proven to be unfounded. *See Society for Good Will to Retarded Children* v. *Cuomo*, 572 F. Supp. 1300, 1340 (E.D. N.Y. 1983).

violence to the neighborhood.[22] In fact, very few residents are involved in behavioral or criminal incidents. Indeed, people with retardation are more likely to be victims than perpetrators of crime.[23] In general, attitudes toward mentally retarded people living in the community become more positive as other citizens come to know people with retardation.[24]

Another prevalent fear — decreased property values — is not supported by empirical evidence. Despite the frequent protests of some homeowner associations, studies have shown no decreases in property values surrounding homes for people with retardation.[25] Evidence also shows no diminution in the quality of life when a community residence joins a neighborhood.[26]

Nearly half of a national sample identified almost all or most of the mentally retarded as "good neighbors."[27] But despite a Gallup Poll commissioned by the President's Committee on Mental Retardation which found that 85% of the respondents would not object to a home on their block for mildly or moderately retarded persons,[28] substantial discrimination against people with retardation persists. See Amici Curiae Brief of the American Association on Mental Deficiency.

---

[22] Okolo and Guskin, *supra* n.17.

[23] *Id.* at 52.

[24] Edgerton, *Failure in Community Adaptation: The Relativity of Assessment*, in ENVIRONMENT AND BEHAVIOR: THE ADAPTATION OF MENTALLY RETARDED PERSONS (Kernan, Begab and Edgerton, eds. 1983).

[25] Okolo and Guskin, *supra* n.17.

[26] *Id.*

[27] Gottwald, PUBLIC AWARENESS ABOUT MENTAL RETARDATION (Arlington, Va: Council on Exceptional Children, 1970).

[28] *President's Committee on Mental Retardation Gallup Poll Shows Attitudes on Mental Retardation Improving*, President's Committee on Mental Retardation Message (Washington, D.C.: April, 1975).

3. The Public Welfare: The Public Treasury.

States have responded to the rising costs of institutional care and the inadequacy of community living options by adopting legislation to mandate the development of community alternatives to institutionalization.[29] For example, the Florida legislature has determined that institutions "are unreasonably costly, are ineffective in bringing the individual client to his or her maximum potential, and are in fact debilitating to a great majority of clients." Fla. Stat. Ann. Sec. 393.062 (West Supp. 1978). In Pennsylvania, the public per capita cost of community living was significantly less than that expended for institutional care for persons with comparable needs (institutional median: $47,000/year; community median: $36,000/year).[30] Program as well as housing costs are less expensive in the community. In 1981-1982, the average Pennsylvania cost per client day in the adult day care program at an institution was $41.51; the average cost per client day for comparable clients in community programs was $28.87.[31]

Although most states began their community programs with their own funds in the early 1970's, three forms of federal assistance have aided the growth of community services: a combination of several distinct federal programs (HUD housing subsidies, SSI for living expenses, Medicaid for medical care), Medicaid reimbursement for intermediate care facilities of fifteen beds or less, and Medicaid funds for small homes through a waiver of certain regulatory requirements.[32]

---

[29] *See, e.g.*, Calif. Welf. and Inst. Code 5450 (As amended, 1979) (West); Colo. Rev. Stat. Section 27-10.5-101 (1975); Mass. Gen. Laws Chapter 19. Section 17 (1966) (West); N.Y. Mental Hyg. Law 13.01 (1977) (McKinney); Texas Mental Retardation Persons Act, Tex. Rev. Civ. Stat. Art. 5547-300.

[30] Temple University/HHS Study, *supra* n.9.

[31] *Id.*

[32] Latib, Conroy and Hess, *supra* n.20.

As a result of the skyrocketing costs of institutional care and the economic incentives for community living, reducing the size of residential settings for people with retardation has gained general acceptance amongst most state and local officials.[33] Professor Gunnar Dybwad, a worker and observer of institutions for the last fifty years, concludes, "Whether it is called a state school, a regional center, a training school, or a developmental center, the mental retardation institution typically developed in our country in practically every state over the past 200 years, is dead."[34] "In many states deinstitutionalization is very nearly an accomplished fact. Several, including Maryland, Minnesota, Florida, Michigan, Illinois, and Pennsylvania have closed, or intend to close, public residential facilities to be replaced by community alternatives."[35] By 1982, over 57,000 people nationwide lived in community residences.[36]

The number of people living in retardation institutions has been declining for about twenty years. For fiscal year 1982, the average daily population of the 279 public retardation institutions in the United States was 119,335, down from 189,546 residents of 182 such facilities in 1971.[37] In 1960, the confined population had reached a total of 213,000.[38]

---

[33] Kirman, *Some Current Trends*, in 12 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, 3 (J. Wortis ed. 1981).

[34] Address by Gunnar Dybwad, *A Society Without Institutions?*, Residential Alternatives Symposium, University of Hartford, at 2 (Dec. 9, 1978).

[35] Craig and McCarver, *supra* n.12 at 99 (note omitted).

[36] Janicki, Mayeda and Epple, *Availability of Group Homes for Persons with Mental Retardation in the United States*, MENTAL RETARDATION 45-51 (1983).

[37] R. Scheerenberger, *Public Residential Services for the Mentally Retarded, 1982* 3-4 (1983).

[38] Nelson & Crocker, *The Medical Care of Mentally Retarded Persons in Public Residential Facilities*, 299 NEW ENG. J. MED. 1039 (1978).

The average population of each institution has similarly declined in the last twenty years from approximately 1500-2000 in 1960 to a little more than 400 today.[39] The rate of institutionalization and the number of people institutionalized have dropped dramatically.[40]

4. The Public Welfare: State Policy.

Most retarded people live among us, their "disability" unnoticed and irrelevant to our social relationships and interaction. Approximately 89% of America's retarded citizens are mildly retarded people who are capable of social and economic self-sufficiency. Moderately retarded people, approximately 6% of the population with retardation, can achieve some social independence and can be economically productive through specialized or competitive employment.[41] Not surprisingly, however, these more recent entrants to the workplace need the special protection of laws prohibiting discrimination on the basis of handicap. *See, e.g.*, 29 U.S.C. Sec. 794; Amendment Article 114 of the Massachusetts Constitution.

It is the remaining 11% — people with severe and profound retardation — that forms the basis for the negative stereotype that all people with retardation are helpless, unfeeling, unaware and unproductive beings, whom some of us are reluctant to embrace as full citizens, friends and family members. These

---

[39] Scheerenberger, *supra* n.37; Craig and McCarver, *supra*, n.12.

[40] Craig and McCarver, *supra* n.12. Nearly all Americans with retardation presently reside in the community; only 1.75% of the 6.8 million people with retardation are institutionalized today. Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 606 (1983) (calculations based on 1980 census). A table of the number of public retardation institutions, census, and average institutional size from 1890 to 1982 is in Ferleger, *id.*, at 636.

[41] Roos, *Basic Facts About Mental Retardation*, in 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 127, 132 (P. Friedman ed. 1979).

stereotypes are wrong, and like the ones before them which were applied to less fortunate immigrants and people of minority races and religions, these labels are rooted in fear and manifested in unreasoned hostility. Especially in the last twenty years, professionals have documented the tremendous behavioral potential of people with severe and profound retardation and, through the application of basic learning principles, have assisted them to increase self-help, social, academic and vocational skills.[42]

The potential of all people with retardation can be realized from this Court's declaration that, "A court may properly start with the generalization that there is a right to minimally adequate training." *Youngberg* v. *Romeo*, 457 U.S. 307, 319 n.29 (1982). In the case at bar, the parties do not dispute that the potential Cleburne Living Center's residents — and people with retardation generally — are able to benefit from habilitation and community living.[43]

---

[42] *See* BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED (T. Thompson & J. Grabowski eds. 1977); S. McClennen, R. Hoekstra & J. Bryan, SOCIAL SKILLS FOR SEVERELY RETARDED ADULTS (1980); Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39 (1975); Whitman & Sciback, *Behavior Modification Research With the Severely and Profoundly Retarded*, in HANDBOOK OF MENTAL DEFICIENCY: PSYCHOLOGICAL THEORY AND RESEARCH (N.R. Ellis ed. 1979).

[43] It is therefore unnecessary for the Court to address again its remark in *dicta* in *Romeo*, that retardation professionals "disagree strongly" about whether all people with severe and profound retardation can receive "effective training", 457 U.S. at 316-317 n.20. Whether correct or not, this statement does not and need not affect state efforts to shift resources from institutional to community services, since there are policy and fiscal reasons, as well as programmatic ones, for ending unnecessary institutionalization. However, the view expressed in footnote 20 does not reflect the state of professional thinking. The studies cited by the Court support provision of habilitation to people with severe and profound retardation and agree that intensive training brings positive results. For a detailed discussion of footnote 20, the studies cited therein, and the consequences of the argument, *see* Ferleger, *supra* at 628-632, 634.

The social policy benefits of community living have another dimension: protection of the fundamental rights of people with retardation. R. Scheerenberger, *A History of Mental Retardation* 252-253 (1983). Federal constitutional law supports state attempts to protect people with retardation from harm by not needlessly institutionalizing them.[44] A growing number of courts have found that large institutions for people with retardation must be supplemented and/or replaced with community care because institutions result in unconstitutional confinement and other harms. Over the past thirteen years, litigation has proceeded in almost every state seeking appropriate alternatives to institutional care for people with retardation.[45]

B. *People With Retardation in Large Institutions.*

While nearly all people with retardation are already living among us in our neighborhoods and sharing the benefits and burdens of the community, a small minority continue to receive unnecessary and ineffective care in large institutions. It is necessary, in Amici's view, to understand the deficiencies of those institutions in order to further appreciate the value of the community opportunities described above which the City Council seeks to deny to the proposed residents of the CLC home.

Institutions have typically been a last resort, utilized only in the absence of alternatives. Prior to the twentieth century, families had few options for taking care of their own mentally retarded relatives. For many years in some parts of the United States, large public institutions provided the only alternative

---

[44] *Youngberg* v. *Romeo*, *supra*; *Parham* v. *J.R.*, 422 U.S. 584, 600 (1979) ("substantial liberty interest in not being confined unnecessarily for medical treatment").

[45] *See, e.g.*, Herr, *RIGHTS AND ADVOCACY FOR RETARDED PEOPLE* (1983), for a discussion of this litigation.

for an average income family faced with the need to care for a retarded relative outside the home.[46]

Conditions at some institutions have improved in the wake of mounting family, judicial and legislative pressures, but serious problems still persist. Despite weak attempts to gain legitimacy as a provider of custodial care to the people with retardation, the image of institutions has been tarnished by public investigation, scholarly studies, and judicial findings.[47] The dehumanization and damaging consequences of institutionalization are now widely known and accepted.[48]

The death rate in institutions is unusually high.[49] Neglect and epidemic disease contribute to diminished life expectancy, failure to correct orthopedic abnormalities renders residents

---

[46] Craig and McCarver, *supra* n.12; Craig and McCarver, *Placement of the Retarded in the Community: Prognosis and Outcome* in 7 INTERNATIONAL REV. OF RESEARCH IN MENTAL RETARDATION (N. Ellis ed. 1974).

[47] Taylor & Bogdan, *Defending Illusions: The Institution's Struggle for Survival*, 39 HUM. ORGANIZATION 209, 211 (1980).

[48] *See* I. Belknap, HUMAN PROBLEMS OF STATE MENTAL HOSPITALS (1956); B. Braginsky & D. Braginsky, HANSELS & GRETELS (1975); R. Edgerton, THE CLOAK OF COMPETENCE (1967); R. King, N. Raynes & J. Tizard, PATTERNS OF RESIDENTIAL CARE: SOCIOLOGICAL STUDIES IN INSTITUTIONS FOR HANDICAPPED CHILDREN (1971); J. Tizard, THE ROLE OF SOCIAL INSTITUTIONS IN THE CAUSATION, PREVENTION, AND ALLEVIATION OF MENTAL RETARDATION 281 (1970); D. Vail, DEHUMANIZATION AND THE INSTITUTIONAL CAREER (1966); McCormick, Balla & Zigler, *Resident-Care Practices in Institutions for Retarded Persons: A Cross-Institutional, Cross Cultural Study*, 80 AM. J. MENTAL DEFICIENCY 1 (1975); Wing, *Institutionalism in Mental Hospitals*, 1 BRIT. J. SOC. & CLINICAL PSYCHOLOGY 38 (1962).

[49] *See, e.g.*, Balakrishnan & Wolf, *Life Expectancy of Mentally Retarded Persons in Canadian Institutions*, 80 AM. J. MENTAL DEFICIENCY 650 (1976) (mortality rate double that of general population); Forssman & Akesson, *Mortality of the Mentally Deficient: A Study of 12,903 Institutionalized Subjects*, 14 J. MENTAL DEFICIENCY RESEARCH 276 (1970); Tarjan, *Natural History of Mental Retardation in a State Hospital Revisited: Releases and Deaths in Two Admission Groups, Ten Years Apart*, 117 AM. J. DISEASES CHILDREN 609 (1969).

less functional, poor dental care causes loss of teeth,[50] and the misuse of drugs results in permanent disease.[51]

The CLC home is to be part of the State of Texas' effort to meet its obligations under state and constitutional law to protect institutional residents from harm. This Court need not decide here the extent of those obligations; that issue is not raised. However, Amici urge the Court to accord appropriate deference to the judgment of retardation professionals and the State's policy favoring community living, especially where that judgment and practical experience has firmly supported that policy for decades.

III. People With Retardation, Like Other Minorities Before Them, Cannot be Excluded from our Neighborhoods Nor Denied Equal Opportunities in Our Communities.

The professional consensus supporting habilitation in small community settings is rapidly being translated into a reality for persons with retardation. In the great majority of communities throughout the country, the movement of people with retardation from antiquated state institutions to homelike community settings has been well received by local neighbors.

But the transition has not been without difficulties in many localities. Like other minorities and immigrants before them, people with disabilities occasionally face irrational fears and hostile discrimination by resistant neighbors. The historical pattern of established communities refusing to admit the next generation of new citizens has repeated itself in some towns

---

[50] Nelson & Crocker, *supra* n.38.

[51] *See generally* Plotkin & Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 STAN. L. REV. 637 (1979).

where public meetings can become open forums for prejudice and hatred.

Where prejudice and discrimination prevent *any* class of people from becoming our new neighbors, fundamental rights are customarily at stake. The situation is no different when people with retardation move to new homes. For individuals already living outside of institutions, the effect of this discrimination is an abridgement of their rights to travel and association. For people confined to institutions who are eager to leave, and for whom professional judgment mandates a move, the effect also involves continued unnecessary deprivation of liberty, privacy, property, and dignity. And for all citizens who are precluded from residing in a place of their choice solely by reason of a characteristic imposed at birth, the right to be free from arbitrary and stigmatizing restrictions is involved. Irrational barriers which deny individuals with retardation the same opportunities as are available to all other persons must be struck down under the Equal Protection Clause. Such barriers also contravene the fundamental rights recognized by international declarations of the United Nations and other standard setting bodies.

It is not new for public officials to use delegated authority to frustrate the exercise of these rights by minority groups. While this country has a long history of such discrimination against various insular minorities, it also has a long tradition of evoking special protections to combat such attitudes. Public actions grounded in prejudice have been rebuked by the Court in a number of areas such as housing patterns, employment decisions, educational assignments, and electoral apportionment. Obstacles such as zoning codes that restrict the exercise of fundamental rights of retarded persons should be subjected to the same scrutiny.

That people with retardation, like other unfavored minorities before them, may be excluded from neighborhoods because of

their *class characteristics* does not mean their *individual* situations need be ignored. The defect in discrimination such as that practiced in the City of Cleburne is that, without any consideration of the individuals involved, the City excludes a minority class of people, based on immutable characteristics and motivated by false and derogatory stereotypes.

Handicapped citizens may be born with different degrees of retardation just as people of color may be black or near white. The question of discrimination does not turn on the shade of an individual's skin or his or her IQ score, but rather on whether the public action preventing a group of people from living in the neighborhood of their choice is directed at a class that is fully entitled to equality under the law and for whom class based distinctions are not reflective of their true capacities and individuality.

Similarly, that the Congress or state legislatures have recognized the historical pattern of prejudice and reacted with special benefits or protections does not unduly complicate the invocation of heightened scrutiny to discriminatory actions. Legislative proscriptions against discrimination in the areas of employment, education, housing, and public accommodation, for example, as well as similar special benefit programs for many minority groups, have never been a justification for dispensing with the special role of equal protection guarantees.

Most people with retardation are already living next door with dignity and acceptance. For the remaining members of their class, we can ill afford — nor will the Constitution permit — prejudice and hostility to exclude them from our neighborhoods. Paternalistic excuses about special needs cannot obscure the separate and unequal treatment historically imposed on people with retardation, and the suspect motivation of restrictions on their fundamental freedoms.

Conclusion

For the reasons set forth above, Amici urge the Court to dismiss the writ of certiorari as improvidently granted, or if it chooses to reach the merits, to affirm the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

STEVEN J. SCHWARTZ*
Center for Public Representation
Northampton State Hospital
Northampton, Massachusetts 01061
(413) 584-1644, Ext. 265

DAVID FERLEGER*
BARBARA HOFFMAN
37 South 20th Street
Suite 601
Philadelphia, Pennsylvania 19103
(215) 567-2828
Counsel for Amici

**Counsel of Record*

Appendix A

Other Counsel

David Shaw
85 Buckingham Street
Hartford, Connecticut 06103
(203) 247-2012
Jamey Bell
Leslie Kearney
Legal Aid Society of Hartford
525 Main Street
Hartford, Connecticut 06103
(203) 566-6360
Attorneys for the Plaintiff Class in
Connecticut Association for Retarded Citizens *v.* Thorne

C. Cooper Fulton
West Virginia Advocates for the Developmentally Disabled
1021 Quarrier Street
Room 407
Charleston, West Virginia 25301
(304) 346-0847
Attorney for the Plaintiff Class in
E.H. *v.* Martin

John McIntosh
New Hampshire Legal Assistance
15 Green Street
Concord, New Hampshire 03301
(603) 224-3333
Attorney for the Plaintiff Class in
Garrity *v.* Sununu

RICHARD F. HOWARD
WILLIAM G. CRANE
DEVELOPMENTAL DISABILITIES LAW CENTER
11 Beacon Street
Boston, Massachusetts 02108
(617) 723-8455
Attorneys for the Plaintiff Class in
Gustafson *v.* Mahoney

PAUL JAMESON
JAMESON, LOCKE & FULLERTON
8 Grove Street
Wellesley, Massachusetts 02187
(617) 235-7000
Attorney for the Plaintiff Class in
Isomone *v.* Garrahy

LAURA SMITH
CASCELL NOBLE
JOSELLE ALBRACHT
TEXAS LEGAL SERVICES CENTER
210 Barton Springs Road
Suite 300
Austin, Texas 78704
(512) 477-4562
Attorneys for the Plaintiff Class in
Lelsz *v.* Kavanagh

DANIEL STORMER
LITT & STORMER
3550 Wilshire Boulevard
Paramount Plaza
Suite 1200
Los Angeles, California 90010
(213) 386-4305
Attorneys for the ten taxpayer group in
Mental Health Association of Los Angeles *v.* Deukmejian

NONNIE S. BURNES
HILL AND BARLOW
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6200
Attorney for the Massachusetts Association for Retarded Citizens in
MARC *v.* Dukakis

DANIEL HEDGES
DEVELOPMENTAL DISABILITIES LAW PROJECT
Appalachian Research and Defense Fund
1116-B Kanawha Boulevard East
Charleston, West Virginia 25301
(304) 344-9687
Attorney for the Plaintiff Class in
Medley *v.* Ginsberg

DOLORES COULTER
DEBORAH MALTISON
MICHIGAN PROTECTION AND ADVOCACY SERVICE
313 South Washington Square
Lansing, Michigan 48933
(517) 487-1755
Attorneys for the Plaintiff Class in
Michigan Association for Retarded Citizens *v.* Smith

Office-Supreme Court, U.S.
FILED
FEB 11 1985
ALEXANDER L. STEVAS,
CLERK

(20)

84-468

In The Supreme Court of the United States
October Term, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

OBJECTIONS OF PETITIONERS TO MOTIONS OF DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY, ET AL., NATIONAL CONFERENCE OF CATHOLIC CHARITIES, ET AL., AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ET AL., AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, ET AL., ASSOCIATION FOR RETARDED CITIZENS/USA, ET AL., DISABLED PEOPLES' INTERNATIONAL AND HUMAN RIGHTS ADVOCATES, INC., FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE

Earl Luna, Counsel of Record
Robert T. Miller, Jr.
Mary Milford
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Counsel for Petitioners

6

84-468

In The Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

OBJECTIONS OF PETITIONERS TO MOTIONS OF DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., NATIONAL ASSOCIATION FOR RIGHTS PROTECTION AND ADVOCACY, ET AL., NATIONAL CONFERENCE OF CATHOLIC CHARITIES, ET AL., AMERICAN CIVIL LIBERTIES UNION FOUNDATION, ET AL., AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, ET AL., ASSOCIATION FOR RETARDED CITIZENS/USA, ET AL., DISABLED PEOPLES' INTERNATIONAL AND HUMAN RIGHTS ADVOCATES, INC., FOR LEAVE TO FILE BRIEFS AS AMICI CURIAE

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully object to the Motions for Leave to File Briefs as Amici Curiae of Disability Rights Education and Defense Fund, Inc., National Association for Rights Protection and Advocacy, et al., National Conference of Catholic Charities, et al., American Civil Liberties Union

Foundation, et al., American Association on Mental Deficiency, et al., Association for Retarded Citizens/USA, et al., Disabled Peoples' International and Human Rights Advocates, Inc., and any other movants who file Motions for Leave to File Briefs as Amici Curiae in support of Respondents for the following reasons:

1.

Attorneys General for the States of Pennsylvania, Iowa, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Wisconsin, Maryland, Connecticut, Arkansas, California, Colorado, Illinois, Louisiana, North Dakota, Rhode Island, Tennessee, West Virginia, and Texas have filed briefs as amici curiae in support of Respondents pursuant to Rule 36.4 of the Rules of the Supreme Court which precludes the necessity for them to obtain the consent to the filing of their briefs as amici curiae. Petitioners are only allowed a maximum of twenty pages to reply to the Respondents and twenty Attorneys General. It is not possible for Petitioners, therefore, to answer additional amici. It would not be fair to permit amici to file briefs that cannot be answered because of the space limit.

2.

Ample briefs of amici curiae have already been filed by the State Attorneys General to advise this Court of different views on the matters before this Court. The time limitation on Petitioners also prohibits them from being able to answer the large number of briefs that have been tendered. Therefore, it would be an impossible task for the Petitioners to reply to those seeking to have their motions granted because of the space and time limitations that exist. For these reasons, Petitioners strenuously object to the filing of such amici briefs. This Court's statement regarding another rule of civil procedure is just as applicable to Rule 36 and the position in which the Petitioners find

themselves — Rule 36 ". . . was written to further, not defeat the ends of justice." *Surowitz v. Hilton Hotels Corporation*, 383 U.S. 363, 373 (1966). To permit the filing of these amici curiae briefs would be extremely unjust to the Petitioners.

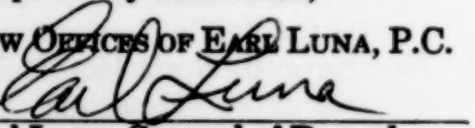
3.

Petitioners further object to the Motion of the American Civil Liberties Union Foundation, et al., for the reason that its proposed brief deals primarily with issues and questions not raised by the parties to this proceeding and not made the basis of the Petition for which certiorari was granted in this case. Furthermore, these extraneous issues are not necessary or germane to a decision of the issues properly before this Court.

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray that the Motions for Leave to File Briefs of Disability Rights Education and Defense Fund, Inc., National Association for Rights Protection and Advocacy, et al., National Conference of Catholic Charities, et al., American Civil Liberties Union Foundation, et al., American Association on Mental Deficiency, et al., Association for Retarded Citizens/USA, et al., Disabled Peoples' International and Human Rights Advocates, Inc., and any others who file Motions for Leave to File Briefs as Amici Curiae in support of Respondents be denied.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



Earl Luna, Counsel of Record
Robert T. Miller, Jr.
Mary Milford
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Objections of Petitioners to the Motions of Disability Rights Education and Defense Fund, Inc., National Association for Rights Protection and Advocacy, et al., Disabled Peoples' International and Human Rights Advocates, Inc., National Conference of Catholic Charities, et al., American Civil Liberties Union Foundation, et al., American Association on Mental Deficiency, et al., and Association for Retarded Citizens/USA, et al., for Leave to File Briefs as Amici Curiae on all parties required to be served and on the movants of the Motions for Leave to File Briefs as Amici Curiae by depositing three copies of the same in the United States mail, on the 8th day of February, 1985, with first-class postage prepaid addressed to the following counsel of record at the addresses indicated, to-wit:

Mr. Renea Hicks
Ms. Diane Shisk
Advocacy Inc.,
7700 Chevy Chase Drive,
Austin, Texas 78752

Ms. Arlene Brynne Mayerson
2032 San Pablo Avenue
Berkeley, California 94704

Mr. Steven J. Schwartz
Center for Public Representation
Northampton State Hospital
Northampton, Massachusetts 01061

Mr. David Ferleger
37 South 20th Street
Suite 601
Philadelphia, Pennsylvania 19103

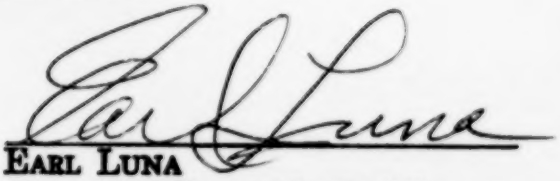
Ms. Karen Parker
154 Fifth Avenue
San Francisco, California 94118

Mr. Lewis A. Golinker
New York Lawyers for the
Public Interest, Inc.
36 West 44th Street
New York, New York 10036

Mr. Burt Neuborne
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036

Mr. James W. Ellis
1117 Stanford, NE
Albuquerque, New Mexico 87131

Mr. Thomas K. Gilhool
Public Interest Law Center
of Philadelphia
1315 West Walnut Street, Suite 1632
Philadelphia, Pennsylvania 19107



EARL LUNA
Counsel of Record for Petitioners

Office-Supreme Court, U.S.
FILED
MAR 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-468

In the Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

EARL LUNA, Counsel of Record
ROBERT T. MILLER, JR.
MARY MILFORD
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Counsel for Petitioners

March 6, 1985

32 pp

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Argument	2
I. The Ordinance and the City Council Decision Satisfy the Rational Basis Standard of Review Which is the Appropriate Standard to be Applied in this Case	2
II. Suggestion of Mootness by Amici	15
III. Petitioners Have Not Violated the Anti-Discrimination Provisions of Section 504 of the Rehabilitation Act or the Revenue Sharing Act	16
Conclusion	19
Certificate of Service	20
Appendix	A-1

TABLE OF AUTHORITIES

Page

Cases

Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98 (1954) 3

California Association of the Physically Handicapped v. Federal Communications Commission, 721 F.2d 667 (9th Cir. 1983), cert. denied, 105 S.Ct. 121 (1984) 6

City of Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982), cert. denied, 459 U.S. 1087, 103 S.Ct. 570 (1982) 14

City of Memphis v. Greene, 451 U.S. 100, 101 S.Ct. 1584 (1981) 9

Grove City College v. Bell, 104 S.Ct. 1211 (1984) .. 17, 18

Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671 (1980) .. 14

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171 (1979) 17

Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission, 314 S.E.2d 218 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984) 1, 12, 13

Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376 (1977) 2

McGinnis v. Royster, 410 U.S. 263, 93 S.Ct. 1055 (1973) 10, 14

McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101 (1961) 4, 14

Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118 (1984) 8, 9

Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 33 S.Ct. 441 (1913) 14

TABLE OF AUTHORITIES (Continued)

Page

Cases

State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50 (1928) 10

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559 (1981) 17

United States v. Arthur Young & Co., 104 S.Ct. 1495 (1984) 17

United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104 (1950) 16

Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974) 4, 8, 9

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926) 3, 14

Constitution

U.S. Const. Amendment XIV, Sec. 1 ..... passim

Statutes

29 U.S.C. § 794 ..... 17, 18

31 U.S.C. § 6716 ..... 16, 17, 18

Tex. Rev. Civ. Stat. Ann. art. 1011a (Vernon Supp. 1985) 11, 12

Tex. Rev. Civ. Stat. Ann. art. 1011j (Vernon 1963) 12

Tex. Rev. Civ. Stat. Ann. art. 5547-202, § 2.17(a) (Vernon Supp. 1985) 11

Tex. Rev. Civ. Stat. Ann. art. 5547-300, § 3 (7) (Vernon Supp. 1985) 5

Tex. Rev. Civ. Stat. Ann. art. 5547-300 § 7 (Vernon Supp. 1985) 10

TABLE OF AUTHORITIES (Continued)

Page

Ordinance

City of Cleburne, Texas Zoning Ordinance (Pl. Ex. 1) ..... passim

Regulations

Tex. Dept. of Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 58 (1982) (Def. Ex. 10) 7

Tex. Dept. of Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982) 7, 11, 15, A-1

Tex. Dept. of Human Resources Code, 40 TAC § 27.102, 9 Tex. Reg. 978 (1984) 6

Tex. Dept. of Human Resources Code, 40 TAC § 27.102, 9 Tex. Reg. 4413 (1984) 6

Tex. Dept. of Human Resources Code, 40 TAC § 27.1002 (1981) 4

Tex. Dept. of Human Resources Code, 40 TAC § 27.2703, 9 Tex. Reg. 2140 (1984) 5

Tex. Dept. of Human Resources Code, 40 TAC § 27.2703, 9 Tex. Reg. 5205 (1984) 5

Other Authorities

American Association on Mental Deficiency, *Classification in Mental Retardation*, 1983 revision .. 6

Texas Department of Health, *Minimum Licensing Standards for Facilities Serving the Mentally Retarded Citizens of Texas*, effective November 10, 1981 (Pl. Ex. 25) 4, 6, 7

No. 84-468

In the Supreme Court of the United States

October Term, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,

Petitioners,

v.

CLEBURNE LIVING CENTER, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

The briefs of Respondents and their supporting Amici rely on emotion rather than fact. The City Ordinance described by them as one barring the mentally retarded from living in the City of Cleburne simply does not exist. The mentally retarded do live in Cleburne, they attend school in Cleburne and they work in Cleburne. (R. Vol. II, pp. 214-215). The Ordinance under review in this case regulates the type structure and location, which can be anywhere in the City,[1] of a business which provides habilitation

[1]Contrary to the claims of Respondents and certain Amici, it should be noted that the resolution (ordinance) in *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 314 S.E.2d 218, 220 (Ga. 1984), appeal dismissed, 105 S.Ct. 57 (1984), was more restrictive than the ordinance in the case at bar because the *Macon* ordinance precluded a home for a maximum of five mentally retarded adults with a maximum of two surrogate parents from operating in single-family residential districts.

services and training to those mentally retarded persons who are not capable of independent living. It affects only this small sub-group of the mentally retarded.

I. THE ORDINANCE AND THE CITY COUNCIL DECISION SATISFY THE RATIONAL BASIS STANDARD OF REVIEW WHICH IS THE APPROPRIATE STANDARD TO BE APPLIED IN THIS CASE

When faced with a similar emotional issue involving the public funding of nontherapeutic abortions in *Maher v. Roe*, 432 U.S. 464, 479, 97 S.Ct. 2376, 2385 (1977), this Court concluded that its decision that the regulation at issue was constitutional was

> not based on a weighing of [the regulation's] wisdom or social desirability, for this Court does not strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." (citations omitted)

The Court further recognized that its decision should be tempered with judicial self-restraint because the "appropriate forum for [the] resolution [of sensitive policy choices] in a democracy is the legislature." *Id.* 432 U.S. at 479.[2]

Respondents and their Amici are supporting the same type practices that caused Congress and the courts to support a national policy of moving retarded persons out of state institutions because of the overcrowded and inadequate facilities. Yet, they criticize the City of Cleburne for not permitting the same overcrowded conditions. The City of Cleburne refused to permit Respondents to stack three

---

[2]The Fifth Circuit's dissent to the denial of the rehearing en banc likewise cautioned judicial self-restraint in the case at bar. See J.A. 143.

and four unrelated adults in one bedroom and found that two and a half baths are not enough for thirteen residents and two staff members. As will be pointed out hereinafter, the State of Texas agrees with the City of Cleburne that thirteen mentally retarded residents is too large a number to be in one habilitation center and will not permit more than six per unit. Two of the Council members who voted to deny the special use permit had experience with the mentally retarded and would not permit the same unacceptable crowded conditions in Cleburne that caused so many problems in state institutions. See J.A. 26 and J.A. 30.

Speaking on the effect of improper housing conditions on the occupants, this Court has stated that such conditions

> . . . may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden.

Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102 (1954).

The Respondents as well as a number of the Amici have shifted the emphasis of their argument away from the question of the propriety of "heightened" judicial review and have focused instead on whether the Ordinance passes the rational basis level of review. The District Court held that it did pass the rational basis test and the Solicitor General points out that the Fifth Circuit did not consider the question.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118 (1926), this Court established the standard for a zoning classification which is the lodestar for this Court's subsequent zoning decisions:

> If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control. (emphasis added)

The Fourteenth Amendment "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective," and a statutory classification "will not be set aside if any set of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105 (1961).

Therefore, as this Court stated in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536 (1974), it does not sit to determine the desirability of the proposed ICF-MR project, but rather to determine if the City's Ordinance regulating the location and structure of the ICF-MR facility rests on any set of facts that are fairly debatable to justify it.

Respondents argue that there is no distinction between the proposed ICF-MR facility and a boarding house, but there is a difference. Any mentally retarded man or woman could live in a boarding house in the City of Cleburne if he or she were capable of independent living. However, an ICF-MR facility for the mentally retarded is not a boarding house. It is a for-profit custodial care operation, classified by the Texas Department of Health as an "institution",[3] which requires more than room and board. It also requires that only those who lack the skills of independent living may be kept there under the federally funded contract. Tex. Dept. of Human Resources, 40 TAC § 27.1002 (1981) requires that an ICF-MR provide on a regular basis, active treatment

> and services to mentally retarded individuals who because of their mental retardation or related condition require care and services *(above the level of room and*

---

[3]Pl. Ex. 25, p. 1, R. Vol. III, 290, *Minimum Licensing Standards for Facilities Serving the Mentally Retarded Citizens of Texas*: "for the habilitation of individuals based on an active treatment program in *institutions* of the character defined and covered herein." (emphasis supplied)

> *board)* which can be made available to them only through institutional facilities. *These individuals cannot function independently.* Supervision is necessary because of mental or physical impairment, or a combination of impairments. (emphasis supplied)

Also, 40 TAC § 27.2703, 9 Tex. Reg. 5205 (1984) printed at 9 Tex. Reg. 2140 (1984) mandates that:

> [a]n ICF-MR must meet the requirements for a state license to provide on a regular basis, health-related care and services to individuals whose mental or physical condition require services that:
>
> (1) are *above the level of room and board*, and
>
> (2) can be provided only by an institution. (emphasis supplied)

The reason for requiring that an applicant obtain a special use permit to operate such a business for the mentally retarded is because the mentally retarded by definition possess significantly subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and, thus, the mentally retarded impact the community in a manner different than any of the other groups or entities which are not required to obtain a special use permit to operate their businesses within the City of Cleburne because none of the other groups or entities definitionally possess the defining characteristics of the mentally retarded.[4] These unique characteristics, which in-

---

[4]The dissent to the Fifth Circuit's denial of rehearing en banc articulated the differences between the mentally retarded and the nonretarded and other groups for which special arrangements are often made. See J.A. 140-141. See Pl. Ex. 27, p. 2, R.Vol. III, pp. 287, 288, and Tex. Rev. Civ. Stat. Ann. art. 5547-300, § 3 (7) (Vernon Supp. 1985), and see generally discussion in Petitioners' Brief at pp. 13-15.

dividuals classified as mentally retarded possess,[5] affect the health, safety and general welfare not only of the residents of the habilitation and training facility who are incapable of independent living but also their surrounding neighbors.[6]

---

[5]"In light of *problems unique* to handicapped persons," (emphasis supplied), the Ninth Circuit held that the FCC's justification of its refusal to include the handicapped in its EEO program was reasonable and, therefore, the FCC did not violate equal protection under the rational basis test. *California Association of the Physically Handicapped v. Federal Communications Commission*, 721 F.2d 667, 670 (9th Cir. 1983), cert. denied, 105 S.Ct. 121 (1984).

[6]All of the applicants who desire to operate businesses in a R-3 District, i.e., hospitals, sanitariums, nursing homes or homes for convalescents or aged for the insane or feeble minded or alcoholic or drug addicts, or penal institutions, are required by Section 8 of the Ordinance to obtain a special use permit for that purpose, which requirement is linked to deficits in adaptive behavior and/or to maladaptive behavior of those the applicants are seeking to serve. Amici American Association on Mental Deficiency, et al., has pointed out that impairment in adaptive behavior is not to be confused with maladaptive behavior at page 4 of their Brief. However, Tex. Dept. of Human Resources Code, 40 TAC § 27.102, 9 Tex. Reg. 4413 (1984) printed at 9 Tex. Reg. 978 (1984) has stated the following in defining the "adaptive behavior level" for level-of-care criteria in ICF-MR I facilities of which Amici AAMD, et al., neglected to inform the Court in their Brief:

> For the purpose of these rules, deficits in adaptive behavior are identified according to American Association on Mental Deficiency's adaptive behavior levels (ABL I, II, III, or IV) as presented in the Association's *Classification in Mental Retardation*, 1983 revision. *Assignment of an adaptive behavior level includes assessment of any maladaptive behavior.* Maladaptive behavior may influence the individuals independence in skills, performance, self-motivation, and acceptability within his community. Maladaptive behaviors are inappropriate behavior, emotional disturbances, or personality disorders. (emphasis supplied)

In addition, it should be noted that the use of restraint, chemical or physical, is an acceptable method of behavior management at ICF-MR Level I facilities in the State of Texas. See *Minimum Licensing Standards for Facilities Serving the Mentally Retarded*

Also, if 201 Featherston Street were a boarding house, it would not be housing thirteen adult men and women in its limited space of 2510 square feet which has only four bedrooms and two and a half baths. Nor should an ICF-MR facility place that many people under such a small roof. Not only is this condition overcrowded, it is detrimental to the well being of the residents, a concept recognized by the Texas Department of Human Resources when it adopted Tex. Dept. Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982)[7] limiting the number of residents at an ICF-MR facility to a maximum of six persons.

Section 16 of the Ordinance provides that a home for the mentally retarded

> may be located in any district by Special Use Permit of the Governing Body, . . . under such conditions as to operation, site development, . . . as may be deemed necessary in order that such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purposes of this Ordinance.

The general "intent and purposes" of this Ordinance are found in the Preamble which clearly states that it is designed to regulate "the density of population, and the location and use of buildings, structures, and land for trade, industry,

---

Citizens of Texas, Pl. Ex. 25, pp. 9-11, R. Vol. III, p. 290. Jerry Walker, the Administrator of the ICF-MR program for the Texas Department of Health testified that restraints may be used on mildly to moderately retarded persons "depending upon the nature of the need for the restraint." (J.A. Vol. III, p. 304).

[7]This TDHR regulation, attached as Appendix A, was adopted on April 9, 1982 and became effective on May 17, 1982. The rule was proposed in 7 Tex. Reg. 58 (January 8, 1982) which appears at J.A. 78-81 as Def. Ex. 10, R. Vol. III, p. 304.

residence or other purposes." (J.A. 49-50, Pl. Ex. 1, p. 1153-1154, R. Vol. II, pp. 6, 7). The Ordinance explicitly goes on to state:

> FOR THE PURPOSE OF PROMOTING HEALTH, SAFETY, MORALS, AND THE GENERAL WELFARE OF THE COMMUNITY, THE GOVERNING BODY OF CLEBURNE DEEMS IT NECESSARY TO ADOPT THE REGULATIONS MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN AND DESIGNED TO LESSEN CONGESTION IN THE STREETS; TO SECURE SAFETY FROM FIRE, PANIC AND OTHER DANGERS; TO PROMOTE HEALTH AND THE GENERAL WELFARE; . . . [AND] TO AVOID UNDUE CONCENTRATION OF POPULATION.

Clearly, these purposes and objectives of the City's Zoning Ordinance are permissible and are equally applicable to thirteen unidentified potential residents and a potential provider of an ICF-MR facility which seeks to locate a site and use an existing inadequate building in the City of Cleburne, as well as the non-mentally retarded who happen to be their neighbors at the proposed location of the ICF-MR facility. *Village of Belle Terre v. Boraas, supra,* 416 U.S. at 6, articulated the concept of the public welfare as "broad and inclusive" and

> the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. (citation omitted)

This concept has stood the test of time and was most recently relied upon by Justice Stevens writing the opinion for this Court in the zoning case of *Members of the City*

Council of the City of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118, 2129 (1984).

The facts which the members of the City Council considered in their decision to deny Jan Hannah a special use permit for the house at 201 Featherston Street were legitimate concerns expressed in conformance with the criteria set out in Section 16 of the Ordinance, the Preamble to the Ordinance, and *Village of Belle Terre, supra.* See J.A. 95.

The Respondents' and certain of the Amici's characterization of the objectives of the Ordinance and the factors which the City Council considered in their decision to deny a special use permit to Jan Hannah as *post hoc* rationalizations are unfounded and untrue.[8] They scoff at the City's concern over the safety of the proposed residents in regard to the heavy traffic in the area of a junior high school and the location of the house in the 500 year flood plain. However, Mr. Justice Stevens, writing the opinion for this Court in *City of Memphis v. Greene*, 451 U.S. 100, 127, 101 S.Ct. 1584, 1600 (1981) stated that a city's safety interest

> . . . . is equally legitimate whether it provides support for an arguably unnecessary preventive measure or for a community's reaction to a traffic accident that adequate planning might have prevented.

The request of the majority of property owners within 200 feet of 201 Featherston Street for denial of the permit was also considered by the City Council. (J.A. 95). How-

---

[8]In fact, David Southern, an officer of the CLC, testified that at both the City of Cleburne Planning and Zoning Commission meeting as well as at the City Council meeting, "possible flooding, the traffic problems, and the size and use of the house" were topics of discussion. (J.A. 34, R. Vol. II, p. 86). See Pl. Ex. 20, R. Vol. II, pp. 6, 7, and Pl. Ex. 26, R. Vol. II, pp. 6, 7.

ever, the Council did not delegate its zoning authority to these residents as was done in *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50 (1928). The District Court found that the Respondents were also "given a full and fair" opportunity to voice their views to the City Council concerning their application for a special use permit. (J.A. 95). This Court has stated that

> our decisions do not authorize courts to pick and choose among legislative aims to determine which is primary and which subordinate . . . The search for legislative purpose is often elusive enough, (cite omitted), without a requirement that primacy be ascertained.

McGinnis v. Royster, 410 U.S. 263, 276, 93 S.Ct. 1055, 1062-1063 (1973). Therefore, while the City Council considered the views of the property owners within 200 feet of the affected property as well as the views of the Respondents themselves, the weight of the factors in their decision to deny Jan Hannah a special use permit is unimportant.

> Rather, legislative solutions must be respected if the distinctions drawn have some basis in practical experience (cite omitted), or if some legitimate state interest is advanced. (cite omitted). So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.

McGinnis, supra, 410 U.S. at 276.

The City's Ordinance does not frustrate State public policy as the Amici State of Texas and TDMHMR and the Respondents have alleged,[9] but rather complements the

---

[9]All state claims under the Texas Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat. Ann. art. 5547-300, Section 7, were voluntarily dismissed by Respondents. (J.A. 84-87).

State's role in delivering services to mentally retarded men and women. Fears of the Respondents and certain of the Amici regarding a trend toward reinstitutionalization should the Fifth Circuit's decision be overturned and the Ordinance held to be constitutionally valid, are totally unfounded. Both the Amicus TDMHMR and the City of Cleburne are assigned certain tasks by the Legislature of the State of Texas. From funds available to it, Amicus TDMHMR "is authorized to provide . . . mental retardation services through the operation of halfway houses, community centers, and other mental health and mental retardation services programs." Tex. Rev. Civ. Stat. Ann. art. 5547-202, § 2.17(a) (Vernon Supp. 1985). "For the purpose of promoting health, safety [and] morals," the City of Cleburne is "empowered to regulate . . . the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose." Tex. Rev. Civ. Stat. Ann. art. 1011a (Vernon Supp. 1985).

The Texas Dept. of Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982) requires that

> (a) Effective May 1, 1982, *all* applications (I, V, VI) for participation in the ICF-MR Program . . . must meet the following requirements.
>
> * * *
>
> (A) The proposed facilities must be located in an *incorporated City* which is *subject to special use permit requirements, local zoning*, and/or occupancy code requirements . . . (emphasis supplied)

The preamble to the Rule states that "[t]he requirements affect *facility size and site location* . . . These criteria ensure that facilities will be residences that are well-integrated into the local community." (emphasis supplied). See Appendix A. Clearly, the Texas Department of Human Resources has

unequivocably articulated the policy of the State of Texas in regard to the role of the municipality *vis-a-vis* the ICF-MR facility. Not only is there no prohibition in State law against the City regulating the location of an ICF-MR facility, it appears that such a special use permit requirement is actually necessary to carry out the State's policy of placing such facilities in the community. In requiring that TDMHMR provide certain services, the Legislature of the State of Texas has not emasculated the City of Cleburne's zoning authority. In fact, "[w]henever the regulations made under authority of this Act (Articles 1011a-1011j) impose higher standards than are required in any other statute . . . or regulation, the provisions of the regulations made under authority of this Act shall govern." Tex. Rev. Civ. Stat. Ann. art. 1011j (Vernon 1963). Therefore, if TDMHMR did not require a special use permit and there were a conflict between the Ordinance and the regulations, the Ordinance governs because it "imposes a higher standard" in its requirement that in order to operate an ICF-MR facility in the City of Cleburne, an applicant must request and obtain a special use permit. The State of Texas and TDMHMR have incorrectly attempted to narrow the scope of the Legislature's entitlement of zoning authority to the City of Cleburne. See Brief for Amici State of Texas and TDMHMR at p. 14.

The fact situation in the case at bar is similar to that in *Macon Association for Retarded Citizens* in which the proposed group homes were to be regulated and administered through the Mental Health Division of the Georgia Department of Human Resources. *Supra*, at 220. The petitioner contended that the decision violated the policy of the State of Georgia which accepted statutory responsibility for its mentally retarded citizens, the primary purpose of the legisla-

tive policy being "to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities." *Supra*, at 220, 221. The petitioner in *Macon Association for Retarded Citizens* also contended that the respondent's decision was "null and void because the petitioner's governmental function of providing housing for the mentally retarded [was] immune from operation of the Resolution." *Supra*, at 220. The Georgia Supreme Court held that property owned by the petitioner corporation was not immune from local zoning regulations, even if the corporation was performing services which were governmental in nature, at least in the absence of a clear expression of intent by the legislature that such immunity be extended. *Macon Association for Retarded Citizens, supra*, at 223.

The Respondents, Amici State of Connecticut, et al., and Amici American Association on Mental Deficiency, et al., attempt to discount the effect of according "quasi-suspect" status on the mentally retarded upon governmental legislation. In fact, Amici AAMD, et al., specifically refer to laws "beneficial to retarded people." Brief of AAMD, et al. at p. 27, n. 39. As the Fifth Circuit dissent to the rehearing en banc pointed out — what legislation is an advantage to the mentally retarded and what legislation a disadvantage to the mentally retarded is often difficult to discern for even those who seek to improve the condition of mentally retarded men and women. See J.A. 140-142. Indeed, what might seem to be an apparent advantage to the mentally retarded might ultimately result in a disadvantage to the mentally retarded.

Respondents have attempted to summarily dismiss this impact as highly improbable. See Respondents' Brief at p. 40. However, the United States Department of Justice as well

as the Petitioners have recognized the inherent problems affecting all levels of legislation if the mentally retarded are held to be a "quasi-suspect" class.

The City Ordinance was promulgated pursuant to valid delegation of authority from the Legislature as interpreted by the Supreme Court of the State of Texas in *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982), cert. denied, 459 U.S. 1087, 103 S.Ct. 570 (1982):

> Zoning regulation is a recognized tool of community planning, allowing a municipality, in the exercise of its legislative discretion, to restrict the use of private property. *Village of Euclid v. Ambler Realty Co.* (cite omitted)

Petitioners submit that the classification found in the Ordinance is based on fact and meets the rational basis standard articulated by this Court, and therefore:

> the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective." *McGowan v. Maryland*, 366 U.S., at 425, 81 S.Ct., at 1105.

Harris v. McRae, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691 (1980). Furthermore, "legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience,' . . . or if some legitimate state interest is advanced." *McGinnis, supra*, 410 U.S. at 276. For this Court has observed that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations, — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443 (1913), quoted in *McGinnis, supra*, 410 U.S., at 270.

II. SUGGESTION OF MOOTNESS BY AMICI

Amici National Association for Rights Protection and Advocacy, et al., have suggested to this Court that the case at bar is moot because the proposed facility will violate the six bed requirement of Tex. Dept. of Human Resources, Rule 326.35.03.005, 7 Tex. Reg. 1641 (1982). Respondents disagree and contend they are exempt from the Rule. See Brief of Respondents, p. 24, n. 11. Petitioners have always contended that the six bed limitation in Rule 326.35.03.005 is applicable to Respondents. See Petition for Certiorari at Statement of the Case, p. 4; Brief for Petitioners, p. 31; Brief of Appellees, No. 82-1565, pp. 6-7; and Appelles' Petition for Rehearing, No. 82-1565, p. 8.

The language of Rule ".005" is quite clear — it applies to *all applications* for ICF-MR Level I facilities, not just those filed after May 1, 1982. The Administrator of the ICF-MR program for the Texas Department of Health testified that ".005" was applicable to Respondents. He explained that every facility in the State of Texas which seeks to enter into a contract to participate in the ICF-MR I program must be certified on a yearly basis and when asked in reference to Rule ".005" if an ICF-MR Level I facility wanted to keep more than six people, would it be able to be certified after May 1, 1982, he replied, "No, sir." (J.A. 43, R. Vol. III, pp. 284, 303).

Clearly, Tex. Dept. of Human Resources, Rule 326.35.03.005, is applicable in the case at bar and precludes Respondent from being certified as an ICF-MR facility for

thirteen residents.[10] Therefore, not being able to break even financially with less than ten or eleven people, Respondents would be unable to open an ICF-MR facility for six people on which they could not even break even. (J.A. 32, R. Vol. II, pp. 59-60).

Should this Court determine this case is moot, the appropriate ruling is not a dismissal of the Writ of Certiorari as suggested by Amici National Association for Rights Protection and Advocacy, but rather, this Court should reverse or vacate the judgment of the Fifth Circuit and remand the case to the Fifth Circuit for entry of an appropriate order directing the District Court to dismiss the action as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 106 (1950).

III. PETITIONERS HAVE NOT VIOLATED THE ANTI-DISCRIMINATION PROVISIONS OF SECTION 504 OF THE REHABILITATION ACT OR THE REVENUE SHARING ACT

The brief of Amici Curiae for the American Civil Liberties Union, et al., suggests that this Court render a decision in favor of Respondents based on the anti-discrimination provisions of the Revenue Sharing Act (31 U.S.C. § 6716) and

---

[10]An unnamed "undersigned counsel" for Amici State of Texas and TDMHMR claims that he "has consulted the appropriate state officials and can inform this Court that the 'six bed rule' would not pose an obstacle to the proposed Featherston Street group home." State of Texas and TDMHMR Brief at p. 15, n. 7. This statement is outside of the record and does not state that the thirteen bed facility would be certified.

These Amici also contend that the house at 201 Featherston Street was "approved for the intended use by the appropriate State authorities." See State of Texas and TDMHMR Brief at p. 2. This contention is also untrue. There is no evidence or finding to support this allegation. The State requested repairs had not even been done at time of trial. (R. Vol. II, pp. 174-175).

Section 504 of the Rehabilitation Act (29 U.S.C. § 794), even though both the District Court and the Fifth Circuit ruled in favor of Petitioners on these points. (J.A. 98, 120). These Amici assert their authority to raise these issues, even though Respondents have not raised them, under this Court's doctrine that a *prevailing party* may urge any ground in support of the judgment. *United States v. Arthur Young & Co.*, 104 S.Ct. 1495, 1501 (n. 12), (1984). However, Amici are not parties to this proceeding, prevailing or otherwise, and have improperly interjected issues wholly foreign to the questions presented on which the grant of certiorari was based. See *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62, 101 S.Ct. 1559, 1562 (n. 2) (1981), *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171 (1979), U.S. Sup. Ct. Rule 21.1(a), 28 U.S.C.A.

Although correctly acknowledging the program-specificity requirements of both Section 504 and the Revenue Sharing Act, Amici attempts to circumvent this Court's recent decision in *Grove City College v. Bell*, 104 S.Ct. 1211 (1984), in that regard, by arguing that the City has excluded mentally retarded persons altogether from the City, per se, and that, therefore, they are excluded from programs within the City that do receive federal funds. Their premise that mentally retarded persons are altogether excluded from the entire City is fallacious. The Ordinance has been in place since 1965 and mentally retarded people live within the City of Cleburne and have complete access to all of its services and amenities. (R. Vol. II, pp. 214-215). If this Court were to accept Amici's argument that the special use permit requirement is a per se exclusion from the City, then it would also follow that all persons, for whom a business which deals with them is required to have a special use permit, are also ex-

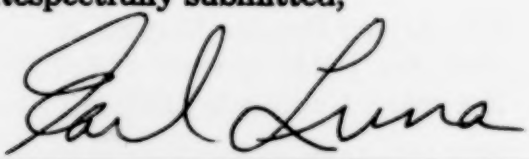
cluded from the City. For example, nursery schools are required to have a special use permit, therefore, all children are completely excluded from the whole City. This argument is totally unrealistic and untenable.

This case is squarely within the *Grove City College, supra*, holding wherein BEOG tuition grants to a student for college tuition represented federal financial assistance only to the College's own financial aid program and, therefore, only that program was within Title IX's anti-discrimination provisions. Likewise, in the present case, the City has shown that its zoning activities are not federally funded and are, therefore, not subject to the anti-discrimination provisions of Section 504 of the Rehabilitation Act and the Revenue Sharing Act. (J.A. 98), (J.A. 120), and (J.A. 70-72, Pl. Ex. 5, R. Vol. II, pp. 6, 7).

CONCLUSION

For the reasons discussed, this Court should declare that the mentally retarded do not constitute a "quasi-suspect" class, the challenged zoning ordinance should be scrutinized at the rational basis level of review, found to be constitutional, as written and as applied, the judgment of the Court of Appeals should be reversed and the judgment of the District Court should be affirmed, or, in the alternative, if this Court determines this cause to be moot, this Court should reverse or vacate the judgment of the Fifth Circuit and remand the case to the Fifth Circuit for entry of an appropriate order directing the District Court to dismiss the action as moot.

Respectfully submitted,



Earl Luna, Counsel of Record
Robert T. Miller, Jr.
Mary Milford

Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(201) 747-1582

ATTORNEYS FOR PETITIONERS

March 6, 1985

CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Petitioners' Reply Brief on all parties required to be served and on all Amici Curiae by depositing three copies of the same in the United States mail, on the 6th day of March, 1985, with first-class postage prepaid addressed to the following counsel of record at the addresses indicated, to-wit:

Mr. Renea Hicks
Ms. Diane Shisk
Advocacy Inc.,
7700 Chevy Chase Drive,
Austin, Texas 78752

Ms. Arlene Brynne Mayerson
2032 San Pablo Avenue
Berkeley, California 94704

Ms. Karen Parker
154 Fifth Avenue
San Francisco, California 94118

Mr. Lewis A. Golinker
New York Lawyers for the
Public Interest, Inc.
36 West 44th Street
New York, New York 10036

Mr. Burt Neuborne
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036

Mr. James W. Ellis
1117 Stanford, NE
Albuquerque, New Mexico 87131

Hon. Jim Mattox
Attorney General of Texas
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Hon. Stephen H. Sachs
Attorney General of Maryland
Munsey Building
Calvert and Fayette Streets
Baltimore, Maryland 21202-1918

Hon. LeRoy S. Zimmerman
Attorney General of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Hon. Joseph I. Lieberman
Attorney General of Connecticut
30 Trinity Street
Hartford, Connecticut 06106

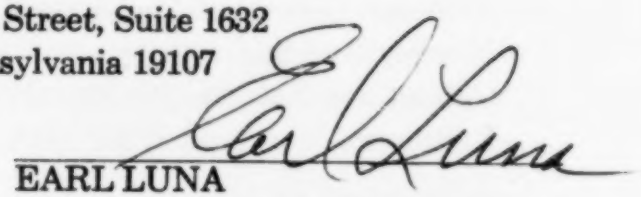
Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Elliott W. Atkinson, Jr.
1755 Wooddale Boulevard
Baton Rouge, Louisiana 70806

Mr. Steven J. Schwartz
Center of Public Representation
Northampton State Hospital
Northampton, Massachusetts 01061

Mr. David Ferleger
37 South 20th Street, Suite 601
Philadelphia, Pennsylvania 19103

Mr. Thomas K. Gilhool
Public Interest Law Center
of Philadelphia
1315 West Walnut Street, Suite 1632
Philadelphia, Pennsylvania 19107



EARL LUNA
Counsel of Record for Petitioners

Appendix A

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Resources

(Editor's note: Because the Texas Department of Human Resources' rules have not yet been published in the Texas Administrative Code (TAC), they do not have designated TAC numbers. For the time being, the rules will continue to be published under their Texas Register Division numbers. However, the rules will appear under the agency's correct title and part.)

Intermediate Care Facility for Mentally Retarded

Eligibility for Participation 326.35.03

The Texas Department of Human Resources adopts with changes new Rule 326.35.03.005 in its Title XIX Intermediate Care Facility for the Mentally Retarded (ICF-MR) Program. The rule was proposed in the January 8, 1982, issue of the *Texas Register* (7 TexReg 58).

The rule presents requirements for provider applicants that will improve program administration. The rule applies to potential applicants and current providers requesting an increase in their number of certified contracted beds. The requirements affect facility size and site location. The requirements also include documentation of the service need met by the provider and of the programmatic services that will be provided. These criteria ensure that facilities will be residences that are well-integrated into the local community, meet a service need in coordination with other mental retardation/developmental disability service providers, and are accessible to programmatic resources.

The rule exempts the Texas Department of Mental Health and Mental Retardation state school and human development center ICF-MR providers. This exclusion is based on Article II, § 4(a), p.11-67 in the 1981-1982 General Appropriations Act, 67th Legislature, 1981, which states that the Texas Department of Mental Health and Mental Retardation shall maximize the amount of medical assistance paid

on behalf of patients in state hospitals for mental disease and in the state schools for the mentally retarded.

Comments were received from the Texas Association for Retarded Citizens and the Texas Society for Autistic Citizens. Both parties disagreed with the exclusion of state school ICF-MR providers and the three-mile radius factor. Both parties also requested the inclusion of a requirement that applicant providers intending to serve Level I clients present evidence of access to less restrictive alternatives to ICF-MR services.

In regard to the exclusion of state school providers, the Texas Department of Mental Health and Mental Retardation must comply with the intent of the General Appropriations Act. Therefore, no change was made in the exception stated in the rule.

In regard to the three-mile radius requirement, the department has retained the requirement and cites the approval given by the ICF-MR Executive Committee representing providers, state agencies, and advocacy organizations, as evidence of the acceptability of this criterion.

The department agrees with the comments that the requirement of Level I providers regarding less restrictive residential alternatives meets legislative intent and the comment has been included (subsection (a) (6)).

Subsection (a) has been amended to clarify the exclusion of Texas Department of Mental Health and Mental Retardation human development centers, as well as state schools.

Subsection (a) (5) has been amended to include examples of program support services which may require description. Also, minor editorial changes have been made.

The following rule is adopted under the authority of the Human Resources Code, Title 2, Chapters 22 and 31, which authorizes the department to administer public assistance.

.005. *Provider Applications.*

(a) Effective May 1, 1982, all applicants (I, V, VI) for participation in the ICF-MR Program, with the exception

of Texas Department of Mental Health and Mental Retardation state school and human development center ICF-MR providers, must meet the following requirements.

(1) Requested certification is limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility.

(2) The proposed facility is located within a given community according to the following specifications.

(A) The proposed facility must be located in an incorporated city which is subject to special use permit requirements, local zoning, and/or occupancy code requirements, and must be noncontiguous to an already existing facility.

(B) No other ICF-MR residential facility is located within the same neighborhood within a three-mile radius.

(C) Access to community resources is documented (as appropriate to level of client).

(3) A needs assessment has been conducted to include the following.

(A) Identification is made of the number of developmentally disabled persons residing in the community and surrounding geographic area (defined in assessment) that can benefit from the services provided by the facility.

(B) Other ICF-MR residential facilities, if any, located within the same community and/or geographic area are identified by name. Number and level of clients served is also stated.

(C) If the facility serves the mentally retarded, letters are obtained from at least the superintendent of the state school and the executive director of the local MH/MR

center (if applicable) in whose catchment area the proposed facility is located. Letters from the state school and community center must include a statement as to the number of persons who will meet the basic admission criteria to the facility. The applicant also should state the number of potential referrals from other state schools and MH/MR programs according to program location.

(D) If the facility serves clients other than the mentally retarded, the applicant must obtain letters, stating the service needs, from the appropriate referral sources.

(4) A written description of the client group to be served, including admission criteria, is submitted.

(5) The applicant must develop a description of the educational, medical, vocational, and any other programmatic support services (as defined by Code of Federal Regulations 442.400) which are required by the clients served. The applicant must send a copy of either a letter of intent, memorandum of understanding, or contract with the service provider, together with the description of each service identified. The purpose of the letters, memoranda, and contracts is to provide evidence that the required services are available to the facility.

(6) If the applicant plans to serve Level I clients, a written description of alternatives for semi-independent and independent living available to the facility for those clients who successfully complete the active treatment plan and evidence of their ability to move to a less restrictive placement must be submitted. In the absence of these alternatives, the facility must present evidence of having initiated planning for the development of these alternatives.

(b) After the Texas Department of Mental Health and Mental Retardation receives the application for participation in the ICF-MR Program and before request for a certification survey by the Texas Department of Health, the Texas

Department of Mental Health and Mental Retardation staff meets the applicant to determine whether the requirements of the program have been met. The contract for services is dependent on satisfactory compliance with these criteria.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 9, 1982.

TRD-823180

Marlin W. Johnston
Commissioner
Texas Department of Human Resources

Effective date: May 17, 1982

Proposal publication date: January 8, 1982

For further information, please call (512) 441-3355, ext. 2037.